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Consumer Protection in the Credit Card Industry: Federal Legislative Controls

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CONSUMER PROTECTION IN THE CREDIT CARD INDUSTRY: FEDERAL LEGISLATIVE CONTROLS

John C. Weistart
TABLE OF CONTENTS

I.	THE EMERGENCE OF THE CREDIT CARD PROBLEM	1476
A.	<i>The Expansion of Credit Card Markets</i>	1476
B.	<i>The Chicago Experience</i>	1478
C.	<i>The Federal Credit Card Statute</i>	1483
II.	THE PROHIBITION OF THE MAILING OF UNSOLICITED CARDS	1485
A.	<i>The Rationale of the Legislative Controls</i>	1485
1.	<i>The Significance of Unsolicited Credit Cards in an Inflationary Economy</i>	1487
2.	<i>The Impact on Personal Financial Integrity</i>	1490
3.	<i>Criminal Activity and Unsolicited Cards</i>	1496
4.	<i>Privacy Intrusions</i>	1497
5.	<i>The Relative Importance of the Stated Legisla- tive Objectives</i>	1500
B.	<i>The Operational Impact of the Mailing Prohibition</i>	1501
1.	<i>The Impact on Competition</i>	1501
2.	<i>The Scope of the Prohibition</i>	1503
3.	<i>Enforcement of the Prohibition</i>	1505
III.	CARDHOLDER LIABILITY FOR UNAUTHORIZED USE	1508
A.	<i>The Rationale of the Statutory Liability System ...</i>	1509
B.	<i>The Operation of the Statutory Liability Limitation</i>	1512
1.	<i>Transactional Exemption for Business Use</i>	1513
2.	<i>The Determination of Agency Status</i>	1518
3.	<i>Unauthorized but Beneficial Use</i>	1522
4.	<i>The Role of Negligence</i>	1525
C.	<i>Implementation of the Statutory Scheme</i>	1528
D.	<i>The Effect of State Statutes and Cardholder Agree- ments on Cardholder Liability</i>	1538
IV.	CONCLUSION	1543

CONSUMER PROTECTION IN THE CREDIT CARD INDUSTRY: FEDERAL LEGISLATIVE CONTROLS

John C. Weistart*

I. THE EMERGENCE OF THE CREDIT CARD PROBLEM

A. *The Expansion of Credit Card Markets*

CREDIT cards have been used as a means of facilitating delayed-payment purchases since early in this century. The first credit card systems were operated by retailers and service organizations in connection with the merchandising of their products. While such programs were used in local markets by department stores,¹ oil companies were the first issuers to recognize the potential of credit card plans in larger geographical areas.² In the early 1950's a new phase in credit card development evolved with the emergence of firms engaging solely in the extension of credit. These firms—Diners' Club, American Express, and Hilton Credit Corporation with its Carte Blanche system—sold no merchandise, but rather enlisted a nationwide system of retail, service, and travel establishments to make credit sales to their cardholders.³ The convenience of a single card that could be used for a variety of goods and services stimulated considerable consumer interest. Since each issuer of a multipurpose card potentially could reach a greater share of the credit card market, competition throughout the industry intensified.

The efforts of the new, independent issuers were concentrated upon the solicitation of accounts, the evaluation of cardholder credit standing, and the development of centralized accounting and pro-

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1. See Davenport, *Bank Credit Cards and the Uniform Commercial Code*, 1 VAL. U. L. REV. 218 (1967); Comment, *The Tripartite Credit Card Transaction: A Legal Infant*, 48 CALIF. L. REV. 459, 460 (1960). The first credit devices used by local retailers were metal discs, termed credit coins, stamped with the name of the merchant and the customer's account number. See *Jones Store v. Kelly*, 225 Mo. App. 833, 36 S.W.2d 681 (1931); *Lit Bros. v. Haines*, 98 N.J.L. 658, 121 A. 131 (1923); *Wanamaker v. Chase*, 81 Pa. Super. 201 (1923); *Wanamaker v. Megary*, 24 Pa. Dist. 778 (Philadelphia Mun. Ct. 1915). The credit coin is discussed in Note, *Implied Contract—Credit Coins and Cards—Negotiability*, 2 U. PITT. L. REV. 117 (1936).

2. Bergsten, *Credit Cards—A Prelude to the Cashless Society*, 8 B.C. IND. & COM. L. REV. 485 (1967). The majority of the oil companies operated regionally in the 1920's. Reciprocal arrangements among companies were established in order to render their cards usable in areas of the country not serviced by the issuer.

3. See generally *id.*; Davenport, *supra* note 1, at 218-19; Comment, *supra* note 1, at 461-62; BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, REPORT: BANK CREDIT CARD AND CHECK-CREDIT PLANS 7 (1968) [hereinafter FED. RESERVE SYS. REP.].

cessing systems. Since these functions are closely related to services provided by traditional financial institutions, it is not surprising that banks undertook to create their own credit card systems. In addition, pressure for bank entry into the industry resulted from the direct competition that nonbank issuers provided as their cardholders substituted card credit for short-term, high interest personal bank loans. Although a few small banks initiated credit card programs in the early 1950's,⁴ the first broad-based bank credit card systems appeared at the end of the decade with the establishment of the Bank of America system on the West Coast⁵ and the Chase Manhattan program in the Northeast.⁶

Despite the large scale of many systems sponsored by retailer-issuers, credit cards attracted little legislative attention until the 1960's. The early statutes were state enactments responsive to industry requests for clarification of the applicability of criminal laws to credit card misuse.⁷ However, the industry itself, and the legal

4. See Davenport, *supra* note 1, at 219 n.3; Robinson, *New Developments in Retail Financing*, 8 KAN. L. REV. 554, 567 (1960). In 1951, the Franklin National Bank of Franklin Square, N.Y., became the first bank in the United States to adopt a credit card plan. By late 1958, approximately 100 smaller banks also had such programs. Wall St. J., Jan. 17, 1967, at 1, col. 6. While most of these small banks entered the field with expectations of high profits, one half of them discontinued the service after a short period. FED. RESERVE SYS. REP., *supra* note 3, at 7.

5. See Davenport, *supra* note 1, at 219; Comment, *supra* note 1, at 462-63. While the Diners' Club, American Express and Carte Blanche cards attempted to attract the travel and entertainment charges of a professional and business clientele, the Bank of America plan was directed to more general consumer use. Bank card plans developed more rapidly on the West Coast than in other areas. By September 1967, nearly one half of the 400,000 business establishments honoring bank credit cards were in the San Francisco (Twelfth) Federal Reserve District. FED. RESERVE SYS. REP., *supra* note 3, at 9, 11. See also Johnston, *Credit and Credit Cards*, in BANKING MARKETS AND FINANCIAL INSTITUTIONS 252, 263 (1971).

6. Following the lead of Bank of America, Chase Manhattan Bank began a credit card plan in late 1958. It did not achieve the rate of growth originally expected, in part due to the reluctance of large department stores in New York City to relinquish their already well-established credit systems. See FED. RESERVE SYS. REP., *supra* note 3, at 7-8. As a result, in 1962 Chase Manhattan sold its credit card system, Uni-Serv Corporation. It was eventually purchased by American Express in 1965. Chase Manhattan's expressed interest in re-entering the credit card industry with the purchase of Diners' Club in 1966 was discouraged when the Justice Department proposed to review the antitrust implications of the action. Wall St. J., May 24, 1966, at 32, cols. 1, 2-3.

7. Once credit card misuse became of national importance, problems emerged when existing state criminal statutes were invoked against cardholders and unauthorized users. Since only a small charge was required to obtain the card, and the card was nontransferable by its terms, it seemed incongruous to value it by the number of purchases that could have been made with it. This raised problems in categorizing the use of a stolen credit card as grand or petit theft. Furthermore, when the credit card was signed by the user, it became a contract between the issuer and the user, which was thereafter incapable of being stolen. In addition, courts that first confronted the credit card problem were often confused as to whether the unauthorized use was larceny, forgery or obtaining property under false pretenses. See Note, *Credit—Credit Cards—Civil and Criminal Liability for Unauthorized or Fraudulent Use*, 35 NOTRE

relationships that it created, remained largely unregulated until adoption of amendments to the federal Truth-in-Lending Act in 1970.⁸

The growth of bank card systems during the mid-1960's primarily accounts for the change in legislative attitude. The Chase Manhattan and Bank of America card systems had established the compatability of credit card and banking practices, and the banking industry itself had developed a more aggressive, less risk-conscious outlook. Banks, once typified by their emphasis upon business accounts, devoted more attention to increasing their personal accounts through expanded consumer services. In addition, banks already had associations that provided a firm foundation for launching a card program. Merchants who had accounts with a bank would be inclined to accept the bank's credit card in order to centralize their financial affairs. Similarly, individuals who had accounts with the bank were likely prospects as cardholders. A bank's reputation for financial stability and quality business management gave it an advantage over nonbanking firms in enlisting other merchants and cardholders. However, as banks readied to move into credit card plans, they realized that competition was likely to be severe. In large cities, there were usually several banks with resources sufficient to finance the initiation of a card system. At the same time, the older merchandising credit plans of the oil companies and similar firms, faced with consumer resistance to the inconvenience of single-product cards, were expanded to allow multiple uses. Cards that formerly could be used only for petroleum products and automotive services and accessories were reformed to cover purchases in the broader travel and entertainment areas.

B. *The Chicago Experience*

The forces leading to expansion of the credit card industry in the mid-1960's were not sufficient to prompt legislation limiting the

DAME LAW. 225, 235-40 (1960); Comment, *Criminal Liability for the Unauthorized Use of a Credit Card*, 7 ST. LOUIS U. L.J. 158 (1962). This confusion led to state statutes that made it a crime to purchase goods by means of a credit card that had been stolen or had expired. See, e.g., ARK. STAT. ANN. §41-1901 (1964); FLA. STAT. ANN. § 817.481 (1965), as amended, (Supp. 1972); MINN. STAT. ANN. §§ 609.52, 545, 785 (Supp. 1972); TEX. PEN. CODE ANN. §§ 1555b-c (Supp. 1972). See also *Hearings on H.R. 12646 Before the House Comm. on Banking and Currency*, 90th Cong., 1st Sess. 39-54 (1967) [hereinafter 1967 House Hearings].

8. Act of Oct. 26, 1970, Pub. L. No. 91-508, tit. V, 84 Stat. 1126, amending Truth-in-Lending Act, 15 U.S.C. §§ 1601-81t (1970) (codified at 15 U.S.C. §§ 1602(j)-(o), 1642-44 (1970), set out in note 34 *infra*).

growth of the industry. The number of issuers of multipurpose cards was still limited, and many segments of the population had not yet been attracted to credit card use. However, the efforts by new issuers to capture these lucrative markets produced conditions that ultimately prompted congressional concern. The event that provided the primary impetus for legislative inquiry into the credit card industry was the initiation of the Midwest Bank Card System by several Chicago banks in the latter part of 1966 and the early months of 1967.

The Midwest Bank Card System was a cooperative venture of five issuers for the exchange of charge receipts from credit card transactions.⁹ Although each issuer sought to enroll merchants into its particular plan, the card of any issuer in the system would be honored by all merchants who had agreed to participate in any one of the individual plans—an arrangement that substantially increased the convenience of each card. The profitability of each plan was dependent upon the issuer's ability to attract a large volume of cardholders, many of whom would also be solicited by the other issuing banks in the system.

The Chicago program was the first undertaken in a highly competitive market. Banks in other cities had secured cardholders and participating merchants from their existing customers without significant difficulty. However, since branch banking is prohibited by Illinois law,¹⁰ Chicago banks realized that solicitations directed only to existing personal and merchant accounts would not produce the volume and geographical diversity necessary to secure maximum market impact in the metropolitan Chicago area; as a consequence, the issuers sought to increase the scope of their marketing operation beyond their existing customers. Cardholder-use patterns provided additional competitive pressure. Customer loyalty was perceived to be quite intense because once a cardholder had been induced to use the card of a particular issuer, he was likely to remain with that plan despite the presence of competing programs.¹¹ Thus, issuing banks in

9. The banks in the Midwest Bank Card System were Continental Illinois National Bank and Trust Co., Harris Trust and Savings Bank, First National Bank of Chicago, Central National Bank, and a group of five smaller banks, which, under the direction of the Pullman Trust and Savings Bank, sponsored a single card. The Pullman group had originally initiated a card plan that was not part of the system. The Pullman card, the Illinois Bank Charge, was added to the Midwest Bank Card System shortly after the initial issuance of other members' cards. See *Chicago Tribune*, Oct. 16, 1966, § 4, at 1, col. 1. See also *Chicago Tribune*, Oct. 26, 1966, § 3, at 9, col. 8.

10. See ILL. CONST. art. 13, § 8; ILL. ANN. STAT. ch. 16½, § 106 (Smith-Hurd 1972).

11. Customer loyalty is fostered by the fact that the issuer-cardholder relationship will necessarily continue as long as a balance is outstanding in the card account. While

Chicago felt it necessary to enter the credit card market before competitors' plans had become firmly established. Moreover, the Bank of America, which had originally concentrated its card plan in California, had announced its intention to franchise its plan to banks across the country.¹² To ensure that the Chicago market be preserved for local issuers, the banks sought to launch their plans before the BankAmericard had attracted significant numbers of merchants and cardholders.

Among the marketing techniques utilized to reach customers quickly was the mailing of unsolicited cards to individuals whose names had been taken from mass-mailing lists.¹³ While the extent to which the lists were prescreened is disputed,¹⁴ the standards applied were clearly not as stringent as those used for small personal loans.¹⁵ The screening that was undertaken did not prevent multiple mailings to an individual recipient by a single issuer. Similarly, the desire to reach persons other than those with an established relationship with the issuing bank resulted in mailings by several banks to a single recipient.

The planning undertaken by the issuers was limited by the need to avoid delays in the initial solicitation of subscribers.¹⁶ As a result of this same pressure, mailings by more than one issuer were undertaken simultaneously.¹⁷ Following extensive publicity, cards directed

paying off an existing balance, the holder may make new purchases, which in turn extend his obligation to the issuer. Also, within the broad categories of card plans—travel and entertainment cards, bank cards, and oil company cards—competing plans possess many of the same operational features, and one plan may offer few advantages over another. For example, the length of interest-free periods on revolving charges is often similar. In addition, plans that participate in interchanges such as the Master Charge system have the same relative number of merchant outlets.

12. See Chicago Tribune, Oct. 16, 1966, § 4, at 1, col. 1; at 5, col. 2.

13. Taylor, *The Chicago Bank Credit Card Fiasco*, BANKERS MAG., Winter 1968, at 49, 50. In many cases where mass-mailing practices were employed, an acceptable credit card risk was an individual for whom no negative credit information had been reported. It appears that the usual sources of names were lists of customers of issuing banks. See generally FED. RESERVE SYS. REP., *supra* note 3, at 26-27.

14. See the testimony of Earl Pollock, Midwest Bank Card System, Inc., in *Hearings on H.R. 13244, H.R. 14364, and Other Bills Before the Subcomm. on Postal Operations of the House Comm. on Post Office and Civil Service*, 91st Cong., 1st & 2d Sess. 91, 102 (1970) [hereinafter 1970 House Hearings]; Taylor, *supra* note 13, at 50; FED. RESERVE SYS. REP., *supra* note 3, at 26-27.

15. In some cases, cards were issued to minors. See note 22 *infra* and accompanying text. Many other recipients had no prior dealings with the issuing banks. FED. RESERVE SYS. REP., *supra* note 3, at 74.

16. It has been reported that several issuers that had originally intended to distribute their cards in March 1967 were forced to accelerate their plans when the Pullman group announced its intention to begin mailing in November 1966. Wall St. J., Jan. 17, 1967, at 1, col. 6; at 15, col. 2. See also Wall St. J., Aug. 29, 1967, at 28, col. 2.

17. See Chicago Tribune, Oct. 25, 1966, § 3, at 7, col. 4.

to millions of individuals were placed with the Post Office.¹⁸ At the same time, the postal system was beginning to receive a significant amount of seasonal mail, and its usual work force had been supplemented by large numbers of temporary workers.¹⁹

The competition among the issuers, their marketing techniques, and the timing of their mailings interacted in a manner that adversely affected the image of both the Chicago banking industry and bank card plans generally. The distribution suggested a casualness that had not formerly been a part of the community image of the issuing banks. Some of the results were humorous. In a three-day period, one individual received seven cards from a single issuer,²⁰ and another reported receiving eighteen cards from the Chicago banks.²¹ Even young children were invited to utilize credit card accounts established on their behalf.²² Other results were far more serious. There were thefts of large quantities of cards in the postal system and from recipients' mailboxes. While it appeared that the misappropriations were the result of an organized effort,²³ this fact was never substantiated. It is clear, however, that significant numbers of persons were involved in the fraudulent use of the stolen cards—occasionally with the knowing cooperation of merchants who had been solicited by the banks to participate in the plan.²⁴

When the scale of the fraudulent activity became apparent, the issuing banks moved quickly to minimize their losses. Merchants with high loss experiences were dropped from the plans. Other merchants were required to telephone the issuing bank for approval of every sale.²⁵ Three of the issuing banks eventually recalled all out-

18. One source estimates that cards were sent to 4 million families. Wall St. J., Jan. 17, 1967, at 1, col. 6; at 15, col. 2. Continental Illinois National Bank and Trust Co. alone distributed 1.5 million cards. Chicago Tribune, Oct. 25, 1966, § 3, at 7, col. 4. The cards were mailed first class without registration or other protection.

19. FED. RESERVE SYS. REP., *supra* note 3, at 75.

20. Taylor, *supra* note 13, at 50. Banks using a number of mailing lists felt that cross-checking to avoid duplications would not be economically feasible. See FED. RESERVE SYS. REP., *supra* note 3, at 74.

21. Wall St. J., Jan. 17, 1967, at 1, col. 6; at 15, col. 2.

22. The names of minors were apparently secured from their savings and checking accounts. Instances of multiple receipts resulted when a recipient had several accounts with the issuing banks. FED. RESERVE SYS. REP., *supra* note 3, at 74.

23. See Taylor, *supra* note 13, at 50.

24. Testimony of William J. Cotter, Chief Postal Inspector, Post Office Department, 1970 House Hearings, *supra* note 14, at 68, 72.

25. See Taylor, *supra* note 13, at 50. In card plans not experiencing the difficulties encountered in the first months of the Chicago plans, merchants generally need not secure issuer approval of sales below a stated amount. The typical floor limit for bank card plans is fifty dollars. See FED. RESERVE SYS. REP., *supra* note 3, at 12; Clontz, *Bank Credit Cards Under the Uniform Commercial Code*, 87 BANK. L.J. 888, 898-99 (1970).

standing cards and reissued them only to those persons who were properly using their cards or who had submitted a written application. Precautions in distribution, such as the use of registered mail, were initiated.²⁶

Despite these efforts, losses were estimated at six million dollars for the period from April to June 1967 alone.²⁷ Bank card plans in all Federal Reserve Districts except the Chicago district recorded fraud and credit losses in the first six months of 1967 of 1.04 per cent of the amount of outstanding account balances. In that same period, Chicago issuers experienced a 5.73 per cent loss.²⁸ The quarterly earnings of some of the issuing banks reflect the significant impact of these losses on the profitability of the firms.²⁹

26. See FED. RESERVE SYS. REP., *supra* note 3, at 75; Wall St. J., Aug. 29, 1967, at 28, col. 2.

27. Taylor, *supra* note 13, at 51. William J. Cotter, Chief Postal Inspector, Post Office Department, placed the loss at 12 million dollars by August 1967. 1970 House Hearings, *supra* note 14, at 241, 244. But see FED. RESERVE SYS. REP., *supra* note 3, at 75, concluding that these estimates are high, since issuers continued to make recoveries.

28. The extent of the fraud and credit losses of the Chicago banks is suggested by the following data from FED. RESERVE SYS. REP., *supra* note 3, at 31. While the Chicago district includes banks other than those involved in the Midwest Bank Card System, most of the activity in the district during the period is attributable to issuers in that system. The table expresses the amount of fraud and credit charge-offs in a six-month period as a percentage of the amounts outstanding on all cards within the district.

FRAUD AND CREDIT LOSSES

Federal Reserve District	Charge-offs Jan. 1 to June 30, 1967 (thousands of dollars)	Amounts Outstanding Sept. 30, 1967 (thousands of dollars)	Loss Ratios (per cent)
Boston	263	21,800	1.21
New York	332	64,800	.51
Philadelphia	135	12,300	1.01
Cleveland	403	26,900	1.41
Richmond	204	28,200	.72
Atlanta	193	30,600	.63
St. Louis	16	12,300	.13
Minneapolis	...	100	...
Kansas City	58	6,400	.91
Dallas	151	8,100	1.86
San Francisco	3495	295,300	1.18
All Districts except Chicago	5250	506,800	1.04
Chicago	7233	126,200	5.73
All Districts	12483	633,000	1.97

29. Taylor, *supra* note 13, at 51, reports 1967 second quarter earnings per share, in dollars, for the five largest banks in Chicago as follows:

One result of the initial losses in the Chicago program was that both the Post Office and card issuers modified their procedures for distributing unsolicited credit cards.³⁰ While the Chicago experience was not repeated elsewhere, the resulting publicity underscored the potential abuse of unsolicited mailings. As other banks and nonbank issuers increased their reliance on this card distribution technique, public concern mounted. Although the adverse impact on profits provided the issuers with a strong incentive to curb the abuses of unsolicited mailings, the broader issue of the impact of the credit card industry upon actual and potential cardholders had now come to public attention.

C. *The Federal Credit Card Statute*

The mass mailing of unsolicited cards was immediately subjected to criticism in Congress. The first proposal for regulation was introduced in August 1967.³¹ The legislative controls initially proposed were directly responsive to bank efforts to establish and expand credit card programs as the proposed ban on unsolicited mailings extended only to these issuers.³² Subsequent bills recognized that nonbank issuers were utilizing this distribution technique with in-

	<i>2d Quarter 1966</i>	<i>2d Quarter 1967</i>
American	1.32	1.35
Continental	.81	.73
First National	1.29	1.11
Harris Trust	1.19	1.08
Northern	1.91	1.93

Of the five, First National, Continental, and Harris had issued credit cards, while American and Northern had not. Thus the three issuing banks all posted noticeable decreases in earnings. The Chairman of the Board at Continental identified "relatively high" fraud losses as a cause of the decrease in earnings. At Harris, a spokesman indicated that one reason for the reversal in the upward earnings trend of prior years was the "increased costs of our charge card plan." *Chicago Tribune*, July 6, 1967, § 3, at 7, col. 4. *See also* *Wall St. J.*, Aug. 29, 1967, at 28, col. 2.

30. *See* statement of William J. Cotter, Chief Postal Inspector, Post Office Department, 1970 *House Hearings*, *supra* note 14, at 241, 244. An example of the security measures suggested for protection of unsolicited mailings is reprinted *id.* at 76.

31. Representative Wright Patman introduced the first bill, H.R. 12646, 90th Cong., 1st Sess. (1967), and chaired the hearings before the House Committee on Banking and Currency that considered his proposal and two related measures. *See generally* 1967 *House Hearings*, *supra* note 7.

32. *See* H.R. 12646, 90th Cong., 1st Sess. (1967). The number of new entrants into the bank credit card field increased dramatically in the two-year period preceding the congressional inquiry into the credit card industry. In 1965, there were sixty-eight bank card plans in existence, only ten of which had been started later than 1959. But in 1966-1967, 129 new plans were initiated. *See* *FED. RESERVE SYS. REP.*, *supra* note 3, at 9.

creasing frequency, and the proposals for regulation were expanded to include them.³³

The amendments to the Truth-in-Lending Act that were eventually adopted not only prohibited the distribution of unsolicited cards but also established a fifty dollar limitation on a cardholder's liability for unauthorized use of his card.³⁴ These two controls touch

33. See H.R. 15103, H.R. 13244, H.R. 14346, H.R. 14897, 91st Cong., 1st & 2d Sess. (1969). See generally 1970 House Hearings, *supra* note 14. Several of the bills considered in the 1970 House hearings are summarized in Kennedy, *The Plastic Jungle*, 31 MONT. L. REV. 29, 38-40 (1969). The measure that received the primary attention of the Senate and served as the basis of the legislation eventually enacted extended coverage to all issuers. See S. 721, 91st Cong., 1st Sess. (1969).

34. Act of Oct. 26, 1970, Pub. L. No. 91-508, tit. V, 84 Stat. 1126. The amendments added six definitional provisions and new sections 132-34 to the Truth-in-Lending Act, 15 U.S.C. §§ 1601-81t (1970), which now provides in relevant part:

§ 1602. Definitions and rules of construction.

(j) The term "adequate notice," as used in section 1643 of this title, means a printed notice to a cardholder which sets forth the pertinent facts clearly and conspicuously so that a person against whom it is to operate could reasonably be expected to have noticed it and understood its meaning. Such notice may be given to a cardholder by printing the notice on any credit card, or on each periodic statement of account, issued to the cardholder, or by any other means reasonably assuring the receipt thereof by the cardholder.

(k) The term "credit card" means any card, plate, coupon book or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(l) The term "accepted credit card" means any credit card which the cardholder has requested and received or has signed or has used, or authorized another to use, for the purpose of obtaining money, property, labor, or services on credit.

(m) The term "cardholder" means any person to whom a credit card is issued or any person who has agreed with the card issuer to pay obligations arising from the issuance of a credit card to another person.

(n) The term "card issuer" means any person who issues a credit card, or the agent of such person with respect to such card.

(o) The term "unauthorized use," as used in section 1643 of this title, means a use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit.

§ 1642. Issuance of credit cards.

No credit card shall be issued except in response to a request or application therefor. This prohibition does not apply to the issuance of a credit card in renewal of, or in substitution for, an accepted credit card.

§ 1643. Liability of holder of credit card.

(a) Limits on liability.

A cardholder shall be liable for the unauthorized use of a credit card only if the card is an accepted credit card, the liability is not in excess of \$50, the card issuer gives adequate notice to the cardholder of the potential liability, the card issuer has provided the cardholder with a self-addressed, prestamped notification to be mailed by the cardholder in the event of the loss or theft of the credit card, and the unauthorized use occurs before the cardholder has notified the card issuer that an unauthorized use of the credit card has occurred or may occur as the result of loss, theft, or otherwise. Notwithstanding the foregoing, no cardholder shall be liable for the unauthorized use of any credit card which was issued on or after the effective date of this section, and, after the expiration of twelve months following such effective date, no cardholder shall be liable for the unauthorized use of any credit card regardless of the date of its issuance, unless (1) the conditions of liability specified in the preceding sentence are met, and (2) the card issuer has provided a method whereby the user of such card can be identified as the person authorized to use it. For the purposes of this section, a cardholder notifies a card issuer by taking such steps as may be reasonably

upon aspects of credit cards that are not necessarily related. The provisions share, however, an underlying federal concern about the practices of an industry that has expanded in a relatively few years to the point where it directly affects the financial status of the majority of American families. This Article investigates the bases of these controls and predicts the likely impact of each upon the conditions they were designed to alleviate.

II. THE PROHIBITION OF THE MAILING OF UNSOLICITED CARDS

A. *The Rationale of the Legislative Controls*

The legislative history of the amendments to the Truth-in-Lending Act indicates that congressional attention focused on the ban of unsolicited mailings. Early bills would have prohibited unsolicited mailings entirely,³⁵ although a subsequently passed House version, not accepted by the Senate, authorized the Postal Service to adopt regulations to increase security in the handling of unsolicited cards in the mail.³⁶ The measure that was eventually enacted originated from Senate Bill 721.³⁷ In its original form, this bill did not directly

required in the ordinary course of business to provide the card issuer with the pertinent information whether or not any particular officer, employee, or agent of the card issuer does in fact receive such information.

(b) Burden of proof.

In any action by a card issuer to enforce liability for the use of a credit card, the burden of proof is upon the card issuer to show that the use was authorized or, if the use was unauthorized, then the burden of proof is upon the card issuer to show that the conditions of liability for the unauthorized use of a credit card, as set forth in subsection (a) of this section, have been met.

(c) Liability imposed by other laws or by agreement with issuer.

Nothing in this section imposes liability upon a cardholder for the unauthorized use of a credit card in excess of his liability for such use under other applicable law or under any agreement with the card issuer.

(d) Exclusiveness of liability.

Except as provided in this section, a cardholder incurs no liability from the unauthorized use of a credit card.

§ 1644. Fraudulent use of credit card.

Whoever, in a transaction affecting interstate or foreign commerce, uses any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card to obtain goods or services, or both, having a retail value aggregating \$5,000 or more, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

35. See, e.g., H.R. 12646, 90th Cong., 1st Sess. (1967).

36. H.R. 16542, 91st Cong., 2d Sess. (1970). After perfunctory debate, this measure was adopted without direct opposition, although there were sixty-four vote pairings. See 116 CONG. REC. 30891-92 (1970). See generally H.R. REP. NO. 974, 91st Cong., 2d Sess. (1970).

37. S. 721, 91st Cong., 1st Sess. (1969).

A year before S. 721 was considered, the Senate held its initial hearings on the practices of the credit card industry. Begun in October 1968, this investigation was not directed toward a specific legislative proposal, but rather was a general inquiry into the impact of unsolicited mailings. Particular attention was given to a study of bank credit card systems prepared by the Federal Reserve System. See *Hearings on Credit*

regulate unsolicited cards, but rather delegated authority to the Federal Reserve Board under the Truth-in-Lending Act to formulate "minimum standards to be followed by all card issuers in checking the worthiness of prospective cardholders."³⁸ In the hearings on the bill, however, the Board of Governors of the Federal Reserve System expressed a reluctance to accept additional responsibilities in the area of consumer protection.³⁹ To avoid the difficulties inherent in granting rule-making discretion to an unwilling agency, and to enhance the impact of the legislative control, the Committee amended the bill to impose an absolute ban on the distribution of unsolicited credit cards.⁴⁰

In contrast to the liability limitation provision, which proved to be noncontroversial, the prohibition of unsolicited mailings drew opposition from industry representatives and the Federal Reserve Board.⁴¹ While the congressional objectives in prohibiting unsolic-

Cards Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency, 90th Cong., 2d Sess. (1968) [hereinafter 1968 Senate Hearings].

38. S. 721, 91st Cong., 1st Sess. § 2 (1969).

39. Andrew F. Brimmer, a member of the Board of Governors, reiterated that group's position that the "assignment to the Board of wide-ranging duties in the general area of consumer protection would be inconsistent with effective performance of our primary duties in the field of monetary policy." *Hearings on S. 721 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency, 91st Cong., 1st Sess. 14, 18 (1969) [hereinafter 1969 Senate Hearings]*. A similar view was expressed by William McChesney Martin, Jr., another member of the Board. *See id.* at 7, 8.

In earlier House hearings, representatives of both the Federal Reserve Board and the Federal Deposit Insurance Corporation had questioned the need for legislative control of unsolicited card distributions in light of the strong economic incentives for banks to correct their distribution practices in order to minimize losses. *See 1967 House Hearings, supra* note 7, at 7, 15-16 (statement of Andrew F. Brimmer, Board of Governors, Federal Reserve System); *id.* at 19, 20 (statement of K. A. Randall, Chairman, Federal Deposit Insurance Corporation). *See also 1968 Senate Hearings, supra* note 37, at 2, 8 (statement of Andrew F. Brimmer).

40. 15 U.S.C. § 1642 (1970), set out in note 34 *supra*. *See* S. REP. NO. 739, 91st Cong., 2d Sess. 6 (1970). After the Senate had adopted the amended S. 721, it received H.R. 16542 from the House. *See* note 36 *supra*. The Senate substituted the more stringent controls of S. 721 in the House measure and requested a conference on the modification. *See* 116 CONG. REC. 31818-19 (1970). Before this conference was held, the Senate received from the House an unrelated bill, H.R. 15073, dealing with record-keeping requirements for federally insured banks. In the course of its consideration of this bill, the Senate inserted the language of S. 721 and returned it to the House for conference. After the conference made minor modifications of the criminal liability provision of the bill, H. R. CONF. REP. NO. 1587, 91st Cong., 2d Sess. 14 (1970), the measure that originated as S. 721 was approved by the Senate, *see* 116 CONG. REC. 35943 (1970) (conference report accepted), and by the House, *see* 116 CONG. REC. 36577 (1970) (conference report accepted).

41. *See, e.g., 1969 Senate Hearings, supra* note 39, at 118 (statement of James E. Brown, Interbank Card Association); *id.* at 123, 125 (testimony of Edward J. McNeal, American Retail Federation); 1970 *House Hearings, supra* note 14, at 13, 14 (letter to Representative Nix from William McChesney Martin, Jr., Board of Governors, Federal

ited mailings were stated in various forms, the supporters of the enacted legislation opposed this card distribution technique because, in their view, the practice gave rise to four undesirable conditions. They felt that such mailings, by introducing millions of people to the convenience of credit card purchases stimulated consumer demand for credit and contributed to the inflationary tendencies of the nation's economy. Moreover, because the credit investigation that preceded the mailing of such cards was often superficial, it was believed that cards came into the hands of many persons incapable of containing the use of such cards within the limits of their personal budgets. Third, the mass-mailing technique increased the likelihood of criminal diversion of cards, which in turn increased the burden on law enforcement agencies. Finally, because the cards were sent to persons who had not requested them, the unsolicited distribution of cards was regarded as an invasion of privacy.⁴²

1. *The Significance of Unsolicited Credit Cards in an Inflationary Economy*

The inflationary impact of credit cards allegedly manifested itself in several forms. The sponsors of the legislation often argued that credit cards provided a readily available form of credit that induced consumers to increase spending.⁴³ The resulting demand for goods and services put pressure on an economy that, at the time of the emergence of bank-sponsored plans, was expanding at a potentially inflationary rate.⁴⁴ There were in fact significant increases in the amount of charges outstanding on all types of credit cards. In the two-year period from 1967 through 1969, outstanding card credit increased by more than one third, or nearly four billion dollars.⁴⁵ A

Reserve System); *id.* at 91, 92 (testimony of Earl Pollock, Midwest Bank Card System, Inc.); *id.* at 162, 163 (testimony of John P. LaWare, Bank Card Committee, American Bankers Association).

42. See, e.g., 1969 Senate Hearings, *supra* note 39, at 1-2 (statement of Senator Proxmire); *id.* at 8, 10 (statement of Representative Hanley); 1970 House Hearings, *supra* note 14, at 3 (statement of Representative Nix); 116 CONG. REC. 11828-30 (1970) (statement of Senator Proxmire); *id.* at 11831 (statement of Senator McIntyre); *id.* at 30878-79 (statement of Representative Olsen).

43. See, e.g., 1969 Senate Hearings, *supra* note 39, at 8, 9 (statement of Representative Hanley); *id.* at 131, 132 (statement of Jerome R. Gulan, National Federation of Independent Businesses, Inc.); 116 CONG. REC. 11830 (1970) (statement of Senator Proxmire).

44. The Federal Reserve Board, which was not resisting the proliferation of credit cards in the consumer credit sector, had undertaken efforts, such as raising the discount rate, to "soften" the demand for other forms of credit. See, e.g., N.Y. Times, Dec. 18, 1968, at 1, col. 8; N.Y. Times, Dec. 22, 1968, § 3, at 1, col. 7.

45. The Board of Governors, Federal Reserve System, Consumer Credit and

significant portion of this increase is attributable to the expansion of bank credit card plans. But, despite the vast amount of credit resulting from credit card use,⁴⁶ the relative importance of the contribution of unsolicited cards to inflationary trends can be questioned. While the amount of card credit was undergoing significant increases, total consumer debt was increasing by greater amounts, indicating that expansion of consumer demand for credit was not a phenomenon attributable solely to credit cards.⁴⁷ Moreover, the proportion of total consumer debt represented by card credit remained relatively small, accounting for 11.26 per cent of total debt at the end of 1967 and 12.49 per cent two years later.⁴⁸ Perhaps the most apparent defect

Finances Section, has compiled figures for revolving credit plans, broken down by the various types of issuers, as follows:

REVOLVING CREDIT PLANS
(Amounts Outstanding in Billions of Dollars)

Type of Credit	Dec. 31, 1967	Dec. 31, 1968	Dec. 31, 1969	Dec. 31, 1970
Bank Credit Cards (excluding check-credit plans)	0.8	1.3	2.6	3.7
Oil Companies (consumer portion only)	1.0	1.2	1.5	1.8
Department Store Revolving Credit	3.5	3.7	4.2	4.6
Retail Charge Accounts	5.9	6.5	6.7	6.9
Travel & Entertainment Cards (consumer portion only)	0.1	0.1	0.1	0.1
All Others	0.2	0.2	0.2	0.2
Total	11.5	13.0	15.3	17.3

Reported by Andrew F. Brimmer, Bank Credit Cards: The Record of Innovation and Growth (paper presented at the Annual Seminar of the Puerto Rican Bankers Assn., March 26, 1971) [hereinafter Brimmer Paper], on file with the *Michigan Law Review*. See also 1969 Senate Hearings, *supra* note 39, at 31 (submission of Andrew F. Brimmer, Board of Governors, Federal Reserve System); S. REP. No. 739, *supra* note 40, at 2.

46. It is inaccurate to refer to the entire amount outstanding as "credit"; the portion of this amount that is paid off within one month more resembles a cash transaction. Hence, comparisons of this total amount to traditional forms of long-term consumer credit, such as automobile loans or other commercial paper, are somewhat misleading. See Brandel & Leonard, *Bank Charge Cards: New Cash or New Credit*, 69 MICH. L. REV. 1033, 1039, 1059-61 (1971).

47. A comparison of total consumer credit and credit card credit in billions of dollars for the years 1967-1970 is presented below:

End of Period	Total Consumer Credit	Credit Card Credit
1967	102.132	11.5
1968	113.191	13.0
1969	122.469	15.3
1970	126.802	17.3

Compare 57 FED. RES. BULL. A56 (July 1971), with note 45 *supra*. The growth of consumer debt during the past decade was phenomenal, rising from 56 billion dollars in 1960 to more than twice that in 1970. 57 FED. RES. BULL., *supra*, at A56.

48. 57 FED. RES. BULL., *supra* note 47, at A56. Those advocating controls could point

in the inflationary argument was the absence of any attempt to identify the relative impact of unsolicited cards. Even if card credit had inflationary ramifications, it was never proved that control of unsolicited cards alone would have any appreciable impact on the growth of card usage.

The analysis of the inflationary impact of cards also failed to evaluate the extent to which increases in card credit merely represented substitutions for more traditional forms of credit. A portion of the increase in credit card balances probably represents a movement away from consumer credit in the form of short-term personal loans and individual charge accounts.⁴⁹ In many other instances, credit cards were used as a substitute for cash.⁵⁰ Concerned about the risk of carrying large amounts of cash, individuals—particularly those who traveled extensively—logically turned to credit cards. To the extent that charge balances are paid immediately upon billing, credit card usage does not necessarily increase either the extent of consumer buying or the amount of outstanding consumer credit.

Because the merchant-cardholder agreement generally provided that merchants participating in independent plans would be reimbursed by issuers in an amount less than the total amount of the sale,⁵¹ Congress was also concerned that the merchant would pass this discount on to the consumer in the form of higher prices, a condition that added to existing inflationary trends.⁵² The hearings include no serious attempt to provide an empirical basis for the

to a significant growth in bank cards. On the implicit assumption that most of these were unsolicited, they argued that the growth of bank card usage evidenced inflationary pressures. The amount of credit outstanding on bank credit cards increased from 0.8 billion dollars in 1967 to 2.6 billion dollars in 1969. *See* note 45 *supra*. However, compared to a total consumer debt of 102 billion dollars in 1967 and 122.5 billion dollars in 1969, this growth did not appear to have had a substantial impact on the growth of consumer credit. *See* note 47 *supra*.

49. The confusion that existed with respect to the significance of credit card growth is illustrated by Senator Proxmire's analysis that "when you have \$15 billion more of demand in our economy, . . . it undoubtedly does have a significant effect on inflation, . . ." 116 CONG. REC. 11830 (1970). This statement presumes that all card credit was "new" credit—that is, credit that would not otherwise have been demanded.

50. *See* Brandel & Leonard, *supra* note 46, at 1039, 1059-61. The characterization of a credit card purchase as either a "cash" transaction or a "credit" transaction has important implications for the policy question whether the cardholder should be able to assert against the issuer defenses arising out of his transactions with a merchant. *See generally id.*; Note, *Preserving Consumer Defenses in Credit Card Transactions*, 81 YALE L.J. 287 (1971).

51. A sample merchant-issuer agreement is set out in Davenport, *supra* note 1, at 248-51.

52. *See, e.g.*, 116 CONG. REC. 11830 (1970) (statement of Senator McIntyre); 1969 Senate Hearings, *supra* note 39, at 75, 79 (statement of Professor Willier, National Consumer Law Center, Boston College).

validity of that analysis. Indeed, the significance of the discount was overstated. While some supporters of the legislation estimated the discount to be as high as seven per cent of the purchase price,⁵³ the figure more typically cited was five per cent.⁵⁴ In fact, in most credit card transactions the discount was less than this. For example, while banks usually sought to secure a three per cent discount from retailers other than petroleum dealers and service organizations,⁵⁵ competition among issuing banks sometimes drove the discount levels down as low as one per cent.⁵⁶ Moreover, the payment of the discount would not necessarily cause the merchant to raise his prices. In exchange for the discount, the issuer would assume the risk of nonpayment and the cost of maintaining the necessary accounting and collection systems; hence, the merchant was relieved of the costs associated with these activities. Merchants might also increase their sales as a result of participation in the plan, thereby offsetting any increase in costs caused by the discount.⁵⁷

It is not suggested that the inflationary implications of credit card usage can be disproved by this limited analysis. What is suggested, however, is that the congressional investigation of the impact of credit cards on inflation was inadequate. The presence of a significant inflationary trend could not be attributed to credit cards, much less to unsolicited cards. This perceived danger resulting from unsolicited credit cards offers no persuasive justification for the statutory prohibition.

2. *The Impact on Personal Financial Integrity*

Another frequently stated concern of the sponsors of the credit card legislation was the impact that the mass distribution of cards had upon the ability of certain recipients to avoid assuming excessive credit responsibilities.⁵⁸ It was feared that credit cards were being sent to persons who were incapable of appreciating the obliga-

53. 1970 *House Hearings*, *supra* note 14, at 4, 6 (testimony of Representative Patman).

54. 116 CONG. REC. 11830 (1970) (statement of Senator Proxmire).

55. *See* Wall St. J., May 24, 1966, at 32, col. 2.

56. *See* Wall St. J., Jan. 17, 1967, at 1, col. 6; at 15, col. 2, *reprinted in* 1969 *Senate Hearings*, *supra* note 14, at 233, 235; Taylor, *supra* note 13, at 52.

57. *See* Johnston, *supra* note 5, at 257; Brandel & Leonard, *supra* note 46, at 1040. If the issuers are successful in enlisting a significant number of competing merchants, the competitive advantage would be cancelled, undercutting the argument that the discount would be absorbed.

58. *See* 1970 *House Hearings*, *supra* note 14, at 22 (statement of Representative Patten); 116 CONG. REC. 11828 (1970) (remarks of Senator Proxmire).

tion that attended their use.⁵⁹ The perceived consequence was disintegration of personal financial stability and a concomitant increase in personal bankruptcies. Although the concern surfaced in both the House and Senate, it was most directly reflected by the legislation proposed in the latter. The House proposals generally regulated only the manner in which unsolicited cards were mailed and, thus, did nothing to ensure that mailings were not made to unqualified persons.⁶⁰ On the other hand, the original Senate version of S. 721 indicated a paramount concern for the impact of the cards on the recipients' credit standing. The rule-making authority proposed for the Board of Governors of the Federal Reserve System directed the Board to prescribe standards that would "protect consumers against over-extending themselves with credit obtained through the use of unsolicited credit cards"⁶¹ This provision was subsequently replaced by the absolute prohibition on unsolicited mailings, but the concern that prompted the original version continued to be expressed.⁶²

In attempting to quantify the adverse impact of uncontrolled extensions of credit, the sponsors relied heavily on testimony concerning the increasing role of credit cards in personal bankruptcy proceedings.⁶³ In 1967, the first year Congress investigated unsolicited cards, the number of nonbusiness bankruptcies surpassed 190,000, culminating several years of significant increases.⁶⁴ Answering inquiries from the Administrative Office of the United States Courts about the significance of credit cards in recent bankruptcy cases, several bankruptcy referees indicated that debts incurred through the use of credit cards were appearing with unprecedented

59. For example, a janitor earning \$55 per week ran up debts totalling more than \$3000, *1968 Senate Hearings, supra* note 37, at 36; a bankrupt with assets of \$20 ran up debts of \$11,178 on a worldwide tour, *id.* at 46; and an alcoholic ran up a liquor bill of \$500 in a short period of time, *1969 Senate Hearings, supra* note 39, at 34.

60. See H.R. 12646, H.R. 13600, H.R. 13796, 90th Cong., 1st Sess. (1967); H.R. 15103, H.R. 13244, H.R. 14346, H.R. 14897, 91st Cong., 1st & 2d Sess. (1969). A measure eventually passed by the House, but not accepted in the Senate, merely directed the Postal Service to adopt regulations to control the manner in which unsolicited cards were mailed. See H.R. 16542, 91st Cong., 2d Sess. (1970). See also notes 35-36 *supra* and accompanying text.

61. S. 721, 91st Cong., 1st Sess. § 2(b)(1) (1969).

62. See, e.g., 116 CONG. REC. 11841 (1970) (remarks of Senator Percy, who supported a more flexible standard of controlling the overextension of the consumer's credit).

63. See statements of Royal E. Jackson, Chief of the Bankruptcy Division, Administrative Office of the U.S. Courts, in *1968 Senate Hearings, supra* note 37, at 30-61; *1969 Senate Hearings, supra* note 39, at 43-61; *1970 House Hearings, supra* note 14, at 132-62.

64. *1970 House Hearings, supra* note 14, at 152 (statement of Royal E. Jackson, Chief of the Bankruptcy Division, Administrative Office of the U.S. Courts).

frequency.⁶⁵ One congressman, noting that the number of non-business bankruptcies had more than doubled in two years, concluded that "most, if indeed not all, of the increase . . . can be attributed to the indiscriminate and uncontrolled use of credit cards."⁶⁶

A closer examination suggests that this conclusion was unsupported by the data presented by the referees. In the two years following commencement of the congressional inquiry into the economic impact of credit cards, the number of nonbusiness bankruptcies declined.⁶⁷ Since credit card use was expanding in this period,⁶⁸ the impact of credit cards on personal bankruptcies appears minimal. The increase in the number of bankruptcy filings prior to 1967 is more appropriately explained by its relationship to the significant growth of total consumer credit during that period.⁶⁹ In addition, the responses of the bankruptcy referees were not overwhelmingly convincing. Most responses were not based on a systematic survey of pending cases, while in other responses, the data supplied did not suggest that credit cards were of noticeable importance.⁷⁰ Furthermore, credit card debts owed to issuers were generally a relatively small proportion of the bankrupt's total indebtedness.⁷¹ Significantly, neither the responses of bankruptcy referees nor the testimony during the hearings attempted to determine the extent to which credit card debts were substitutions for other forms of borrowing by bankrupts. While the data presented do suggest that other forms of credit

65. In the Eastern District of Tennessee, where the most complete statistics were gathered, debts on bank cards were listed in 17 per cent of the wage-earner cases filed. The average indebtedness on these cards was \$542, while the average total indebtedness of the bankrupts was \$4200. See 1969 Senate Hearings, *supra* note 39, at 48.

66. 1970 House Hearings, *supra* note 14, at 237, 238 (testimony of Representative Charles Wilson).

67. 1970 House Hearings, *supra* note 14, at 152. Royal E. Jackson, Chief of the Bankruptcy Division, Administrative Office of the U.S. Courts, submitted the following information on bankruptcy filings by class:

<i>Fiscal Year</i>	<i>Nonbusiness Bankruptcies</i>	<i>Total Bankruptcies</i>
1966	175,924	192,354
1967	191,729	208,329
1968	181,266	197,811
1969	169,500	184,930

68. See note 45 *supra*, which illustrates the increase in credit card balances. See also note 48 *supra*.

69. See generally Countryman, *Proposed New Amendments for Chapter XIII*, 22 BUS. LAW. 1151 (1967).

70. See 1968 Senate Hearings, *supra* note 37, at 43-44 (letter from the Referee in Bankruptcy, Western District of Washington); 1970 House Hearings, *supra* note 14, at 143-44 (letter from the Referee in Bankruptcy, Southern District of Ohio).

71. See 1968 Senate Hearings, *supra* note 37, at 41 (letter from the Referee in Bankruptcy, District of Minnesota); *id.* at 44-45 (letter from the Referee in Bankruptcy, Eastern District of Wisconsin).

might not have been available for some purchases made with credit cards, many items purchased on cards could have been financed by other means. On the basis of the evidence presented to Congress, it can only be said that the incidence of credit card debts revealed in bankruptcy proceedings increased in the few years preceding the initiation of the congressional inquiry. But because no attempt was made to quantify and analyze that increase, and since the years sampled reflected only the early history of unsolicited mailings by banks, the adverse impact perceived by some provides an inadequate basis for generalization about subsequent experience. The testimony presented does not support the conclusion that a prohibition of unsolicited mailings would have an appreciable impact on the frequency of nonbusiness bankruptcies.

An additional factor that seemed to support the concern for the impact of credit cards upon personal financial integrity was the higher loss ratio experienced by banks on card credit than on other forms of consumer lending.⁷² The evidence available during the congressional investigation was not unequivocal, for the delinquency rates under established card plans compared favorably with the experience of banks on other types of loans.⁷³ But findings of the

72. See S. REP. NO. 739, 91st Cong., 2d Sess. 2 (1970).

73. While limitations in available data preclude convincing generalization, some banks experienced relatively low delinquency rates. The delinquency experience of banks in the Federal Reserve Districts of New York and San Francisco in 1967 compare favorably with other types of loans. Banks in these districts experienced delinquencies of approximately 1.57 per cent of the dollar value of their customers' credit card transactions. FED. RESERVE SYS. REP., *supra* note 3, at 32. By comparison, data reflecting the experience of all Federal Reserve banks indicate that 1.45 per cent of all regular installment loans were delinquent. Home appliance loans, a type of credit closely related to card credit, Johnston, *supra* note 5, at 256, were delinquent at the rate of 2.19 per cent. Automobile and personal loans, the two other types of loans represented in the composite figure, were delinquent at the rates of 1.24 and 1.48 per cent, respectively. FED. RESERVE SYS. REP., *supra* note 3, at 32. Incomplete statistics from 1966 suggested a similarly favorable comparison. See 1967 House Hearings, *supra* note 7, at 55 (testimony of Andrew F. Brimmer, Board of Governors, Federal Reserve System).

The New York and San Francisco districts cover bank card plans that were relatively mature when the statistics were compiled. Available data indicate that losses experienced in a card plan decrease as the age of the plan increases.

BANK CREDIT CARD LOSS RATIOS BY LENGTH OF ISSUER OPERATIONS

Years in Operation	Loss Ratio (per cent)
11 or more	1.03
9-10	1.17
7-8	0.19
5-6	1.25
3-4	1.43
0-2	3.25
Average Loss	1.97

This table indicates loss ratios rather than the delinquency rates discussed above. Data

Federal Reserve System made available after the close of legislative hearings do confirm that credit card losses are appreciably higher than those experienced with other forms of loans.⁷⁴ Since many bank plans were initiated by unsolicited mailings, this form of card distribution seemed to be related to the higher default rate. Available data, however, does not confirm this relationship. Statistics on loss experiences in bank plans do not distinguish between solicited and unsolicited accounts. Furthermore, the difference in default rates between card credit and other forms of lending is more directly related to the nature of the credit than to the manner of its issuance. With other forms of credit, the lender can make an evaluation of the debtor's credit standing before the credit is used. The debtor's use of card credit, however, is not directly supervised on a transactional basis. Card credit, while typically subject to a credit limit, continues to be available despite changes in the borrower's financial position.

The loss experience of card issuers has been significantly affected by changes in general economic conditions. The increased losses that issuers experienced in 1969 and 1970 are explained, in part, by the recession that was developing in that period. This condition produced dramatic increases in the delinquency rates suffered by issuers, an effect not limited to firms that relied heavily on unsolicited mailings.⁷⁵ While defaults in other types of consumer loans also are affected by deteriorating economic conditions, the impact on card credit is likely to be more pronounced because of the less direct supervision of such lending. Moreover, because the debtor often has greater control over the rate of his repayment of credit card account balances, other types of loans, particularly fixed-sum installment

on the loss experience of bank credit cards does not distinguish between fraud losses and credit losses. Since losses due to fraud may be incurred through misuse by a person other than the cardholder, the stated loss experience is not a precise indicator of the extent to which individuals fail to meet their credit card obligations. Loss ratios and delinquency rates logically should, however, bear a closely proportional relationship.

The delinquency rates of plans in some districts other than New York and San Francisco were unusually high. Banks in the Chicago area, for example, experienced a delinquency rate of 3.69 per cent. Rates in these areas are probably not representative of the likely long-term experience of issuing banks. See FED. RESERVE SYS. REP., *supra* note 3, Table 8A at 32.

74. As a percentage of year-end outstanding credit advances, charge-offs on bank credit cards among all members of the Federal Reserve System were 2.38 per cent in 1969. The banks' loss experience worsened in 1970, as charge-offs amounted to 3.39 per cent. Losses on other types of consumer loans were significantly less. In 1969, for example, losses on personal loans were approximately 0.8 per cent of the outstanding advances. See Brimmer Paper, *supra* note 45, at 6-7. See also 1967 House Hearings, *supra* note 7, at 12. The higher charge-offs for bank credit cards may be due in part to the inclusion of fraud losses in the totals. See note 73 *supra*.

75. The number of delinquencies in the accounts of the Diners' Club, which issues

obligations, are likely to be given priority as resources available to a debtor for repayment become strained.

The legislative inquiry into the impact of credit cards gave particular attention to the numerous reports of personal financial difficulties resulting from credit card use. A partial explanation for many of these experiences is found in the techniques used to develop credit card plans, particularly those initiated by banks. During the years immediately following initiation of a card plan, a bank often experiences a large loss rate;⁷⁶ as the plan matures, losses decrease. Many of the publicized credit card abuses occurred during the period immediately following initiation of a plan and often involved cards that were sent following only limited credit investigations. While the rigor of an issuer's credit standards was increased as loss experiences became known, initially high personal default rates may be inherent in the system used for selecting participants in card plans. Issuers of card credit observe lower credit standards in an effort to achieve the volume of cardholders necessary to sustain a profitable program.⁷⁷ Rather than relying solely on preissuance credit evaluations, in many cases the issuer uses a cardholder's actual payment performance to determine his suitability as a credit risk.⁷⁸ Through adequate control of the initial credit limit for cardholders with questionable credit ratings, the issuer can extend his plan to persons who might not meet more traditional credit standards, while nevertheless ensuring that losses will not exceed reasonable limits.

This market-selection technique contributed to the congressional dissatisfaction with credit card plans, particularly those initiated by banks in the mid-1960's. The legislative history suggests that many congressmen felt that it was improper for issuers to induce an individual to test his capacity to handle credit. It is doubtful, however, that the legislation ultimately adopted will substantially deter this technique.⁷⁹ In those situations where the person requesting a card has completed an application, an issuer may continue to employ

cards only in response to applications, doubled in the period from June 1969 to December 1970. See Ross, *The Credit Card's Painful Coming-of-Age*, FORTUNE, Oct. 1971, at 108, 110. The charge-offs in bank credit cards mirrored this experience. See note 74 *supra*.

76. See note 73 *supra*.

77. See Brandel & Leonard, *supra* note 46, at 1036-37.

78. Cf. 1968 Senate Hearings, *supra* note 37, at 19 (testimony of Andrew F. Brimmer, Board of Governors, Federal Reserve System).

79. Insofar as the prohibition of mailing unsolicited cards increases the cost of initiating new credit card plans, however, it will inhibit their creation altogether. See notes 107-08 *infra* and accompanying text.

limited preissuance credit-screening and choose instead to rely heavily on the payment performance of the cardholder. The prohibition on unsolicited mailings, unlike the original version of S. 721 which would have ordered the Federal Reserve Board to establish minimum credit standards, leaves the matter of credit evaluation to the issuer's discretion. The factor that operates to limit the level of risk an issuer will find acceptable—the threat of limited profitability—is unaffected by the legislative prohibition of unsolicited mailings.

3. *Criminal Activity and Unsolicited Cards*

The generalized use of credit cards was accompanied by an increase in criminal activity involving credit cards. Easily obtained by illicit means, credit cards were often accepted without corroborating identification by merchants who were assured of reimbursement by the issuer. A study undertaken by the Federal Reserve System indicated that the huge losses suffered by issuers in Chicago were primarily the result of fraudulent misuse by unintended recipients⁸⁰ rather than overextension of credit to intended recipients.⁸¹ The Post Office reported a dramatic increase in the number of prosecutions arising from credit card thefts,⁸¹ and several well-publicized instances of criminal misuse of credit cards were circulated while congressional hearings were being conducted.⁸² This evidence prompted proponents of the federal legislation to suggest that federal controls were necessary in order to thwart criminal activity in credit cards.⁸³

A major deficiency in this analysis was the failure of Congress to recognize that card issuers had a significant financial incentive to develop distribution procedures that would minimize the incidence of card misuse. The Chicago experience and losses sustained by banks elsewhere suggest a relationship between mass mailings and theft;⁸⁴

80. See FED. RESERVE SYS. REP., *supra* note 3, at 75. Statements of officials of the Chicago banks, although understandably guarded, also indicated the importance of fraud losses in the initially adverse experience of the Chicago issuers. See Chicago Tribune, July 6, 1967, § 3, at 7, col. 4.

81. 1970 House Hearings, *supra* note 14, at 70. William J. Cotter, Chief Postal Inspector, Post Office Department, testified that mail fraud investigations involving credit cards increased from 15 in 1964, to 360 in 1968, and to 762 in 1969.

82. See, e.g., 1969 Senate Hearings, *supra* note 39, at 235, reprinting Wall St. J., July 30, 1969, at 7, col. 4; *id.* at 236, reprinting Washington Post, Nov. 26, 1967, § F, at 1, col. 4.

83. 1969 Senate Hearings, *supra* note 39, at 8, 12 (statement of Representative Hanley); 1970 House Hearings, *supra* note 14, at 3 (statement of Representative Nix); 116 CONG. REC. 11839 (1970) (statement of Senator Proxmire); *id.* at 30878-79 (statement of Representative Olsen).

84. See 1970 House Hearings, *supra* note 14, at 83-90 (testimony of Seymour Rotker, Executive Assistant to the District Attorney, Bronx, New York).

but because issuers bore the financial loss of misappropriation, it could be expected that they would develop more sound distribution techniques. Indeed, as additional security measures were devised to protect card distributions, losses in mailing were reduced to an insignificant level.⁸⁵ Yet, Congress made no attempt to determine the extent to which susceptibility to theft experienced in Chicago and elsewhere had been corrected by the issuers themselves.

Reliance on the criminal-misuse rationale is also misplaced because Congress failed to realize that misuse would not be curbed by a legislative control that affected only unsolicited cards. The primary attraction of the credit card as a vehicle for criminal activity is the relative ease with which fraudulent charges can be made. Hence, a limitation on the conditions by which cards are distributed is likely to produce only an alteration in the techniques used to acquire cards.⁸⁶ Most criminal use of such cards involves techniques that can be applied whether a credit card was unsolicited or issued pursuant to a request. Misappropriation techniques include diversion by dishonest employees of credit card issuers, thefts during burglaries or personal assaults, retention by dishonest merchants during sales transactions, and misdirection of cards by false applications or requests for renewals⁸⁷—none of which depends upon an initial unsolicited issuance. A ban of unsolicited cards reduces the opportunity for criminal misuse insofar as it may limit the aggregate number of credit cards in circulation, but there is no indication that Congress employed the ban of unsolicited mailings in order to limit the growth of the credit card industry. Until the underlying condition of ready acceptability is remedied, credit card crimes are not likely to be deterred.

4. *Privacy Intrusions*

Although the prohibition of unsolicited mailings is likely to have little impact in confronting the problems of inflation, credit misuse, or credit card crimes, the ban does have the effect of preventing further invasions of the privacy of card recipients. Yet, the prohibition is a limited, rather than comprehensive, control of privacy

85. According to one informal survey, three New York banks that mailed 2 million cards in one week lost only 250 cards. See *1970 House Hearings*, *supra* note 14, at 232, 235 (statement of New York State Senator John Dunne).

86. Other measures such as more stringent identification procedures would make the card less readily usable by unauthorized holders, and hence would offer a more likely solution to the problem. See note 141 *infra*.

87. See *1970 House Hearings*, *supra* note 14, at 242-43 (statement by William Lottes, Chief Postal Inspector, Post Office Department); *Wall. St. J.*, Nov. 18, 1970, at 1, col. 6.

intrusions. Despite the ban of the mailing of unsolicited cards, individuals continue to be subjected to mailings and solicitations in other forms. Circulars and application forms may still be mailed without limitation.⁸⁸ An issuer also may resort to telephone solicitations to induce the "request" required by the statute,⁸⁹ and in many situations the telephone request may cause the recipient particular inconvenience. Such a solicitation commands the immediate attention of the person called and, unlike a mailing, may divert his concentration from more highly valued activities. Perhaps more significantly, because the legislative action forecloses one effective avenue of solicitation, issuers will increasingly resort to these other forms. Hence, privacy intrusions from credit card issuers not only will continue, but also are likely to be attempted with increased frequency.

In this perspective, the condition confronted by the new legislation does not address all the potential forms of privacy invasions by issuers, but only the specific intrusion unique to mailings of unsolicited cards: such cards force recipients into commercial associations that they might not otherwise choose. Admittedly, as a result of general commercial practices, individuals are frequently thrust into a variety of involuntary associations, such as those that result from the distribution of subscription cards prestamped with the recipient's name or the use of one's name in promotional material sent to third parties.⁹⁰ But the relationship that flows from unsolicited credit cards has two distinctive features: the recipient must take significant affirmative action to terminate the association, and the consequences of not terminating it are perceived to be great.

The hearings held on the statute reveal that the mailing of unsolicited cards was a matter of significant public concern. The reports are replete with letters from individuals expressing alarm because they had been extended credit.⁹¹ This response, from a public con-

88. While the legislation is intended to make it more difficult for issuers to get cards into the hands of recipients, the difficulty involved in securing a cardholder's commitment may be minimal. An issuer might offer to send a card if the preselected recipient indicates his assent on a business reply card. See *1968 Senate Hearings, supra* note 37, at 27 (statement of Senator Proxmire).

89. 15 U.S.C. § 1642 (1970), set out in note 34 *supra*. Techniques of oral solicitation have already been refined. See *1970 House Hearings, supra* note 14, at 179-91 (statement of Irvin Penner, President, The Gracious Lady Service, Inc., urging an exemption for oral solicitations).

90. See A. MILLER, *THE ASSAULT ON PRIVACY* 80-82 (1971).

91. See, e.g., *1967 House Hearings, supra* note 7, at 57 (letter to Betty Furness, Special Assistant to the President for Consumer Affairs); *id.* at 95-107 (letters to Representative Patman); *1970 House Hearings, supra* note 14, at 33-39 (letters to Representative Bingham).

tinually subjected to a barrage of unwanted mail, may appear surprising. The ferocity of the responses suggests, however, that the card mailings affected a particularly sensitive concern: most individuals regard their financial affairs as highly personal matters and are offended when an account is created for them without their consent—perhaps with an institution with which they have had no previous contact.

If that association could be terminated easily, the offensiveness of the intrusion would be minimal. Recipients thought, however, that the particular relationship created by a credit card could be ended only by considerable initiative on their part, and the perceived significance of a failure to do so was quite important. There was particular concern that the intended recipient might be liable for purchases made by someone who had intercepted the card from the mails. Despite considerable evidence that few issuers attempted to hold recipients liable for unauthorized uses occurring before an unsolicited card came within their control,⁹² many persons nevertheless believed that some liability might result.⁹³ Even if the card arrived safely, discarding it would not necessarily produce the desired result; the card might be retrieved by another person and used to make charges against the holder's account.⁹⁴ Some recipients regarded destruction of the card as a difficult task.⁹⁵ Whether the card was intercepted from the mails or arrived safely, there remained the risk that accounting errors would result in charges against the account.⁹⁶ In any case, the cardholder would have to endure the inconvenience both of informing the issuer of the improper charges and presenting a credible case that the debts should not be attributed to him.

While statistics suggest that only a small portion of intended recipients took affirmative action to contact the card issuers,⁹⁷ they do

92. See 1969 Senate Hearings, *supra* note 39, at 103, 106 (statement of Thomas Bailey, American Bankers Association); *id.* at 14, 18-19 (statement of Andrew F. Brimmer, Board of Governors, Federal Reserve System); 1970 House Hearings, *supra* note 14, at 91, 92 (statement by Earl Pollock, Midwest Bank Card System, Inc.). See also FED. RESERVE SYS. REP., *supra* note 3, at 75.

93. See, e.g., 1969 Senate Hearings, *supra* note 39, at 8, 11 (statement of Representative Hanley); *id.* at 63, 64 (statement of Robert Meade, Director, Legislative Affairs, President's Committee on Consumer Interests).

94. See 1967 House Hearings, *supra* note 7, at 96-97 (letter to Representative Patman evincing concern over disposing of a credit card).

95. 116 CONG. REC. 11829 (1970) (statement of Senator Proxmire).

96. See 1969 Senate Hearings, *supra* note 39, at 32, 35 (statement of Paul Rand Dixon, Chairman, Federal Trade Commission).

97. Several banks reported that less than one per cent of the mass-mailed cards were returned. 1968 Senate Hearings, *supra* note 37, at 24 (statement of Thomas Bailey, American Bankers Association). Statistics compiled by Shell Oil Company show a return rate of 1.1 per cent. 1970 House Hearings, *supra* note 14, at 228.

not refute the presence of considerable concern and confusion in recipients' minds. Only a few individuals expended the additional effort to contact their legislative representatives, but the number was sufficiently large to prompt members of Congress to generalize the concern.⁹⁸ Moreover, there was relatively little political risk in a stand against credit cards since the issue was not likely to generate general public opposition. Most people would not be angered if the flow of unsolicited cards were interrupted, and those who desired the opportunity to receive a credit card could do so by a simple request to issuers who were anxious to expand their programs. Presented with an opportunity to register support for the growing consumer protection movement without inviting public controversy, the legislators were secure in approving the measure.

5. *The Relative Importance of the Stated Legislative Objectives*

Analysis of the legislative deliberations suggests that the association between the first three conditions—inflationary pressures, unreasonable consumer debt, increased crime—and unsolicited credit cards was not established to a degree justifying congressional action. The fourth condition—privacy intrusions—is not a feature unique to unsolicited credit cards, but can be understood only in terms of the forced associations resulting from unsolicited mailings and the sensitivity of consumers to interference with their personal financial affairs.

The singular prominence of the concern for the impact of forced associations is highlighted by the realization that the other legislative objectives could have been furthered by measures less drastic than the mailing prohibition. Indeed, the desired effects would have been fostered by a statute that simply imposed the costs of card misuse solely on the issuer. This is particularly true with respect to the concern for increased crime and personal bankruptcies. Forcing issuers to bear the cost of criminal misuse—as other provisions of the statute require⁹⁹—assures that precautions will be taken to curtail losses attributable to these causes.¹⁰⁰ Similarly, discharge of consumer debts through the bankruptcy process will lead issuers to tighten their lending practices and raise their credit standards. In either case, the additional measure of prohibiting unsolicited mailings would

98. See, e.g., 1967 House Hearings, *supra* note 7, at 95-107 (letters to Representative Patman).

99. 15 U.S.C. § 1643(a) (1970), set out in note 34 *supra*.

100. See Note, *Credit Cards: Distributing Fraud Loss*, 77 YALE L.J. 1418, 1424-26 (1968).

seem inefficient since it affects only a limited number of credit card arrangements.¹⁰¹ But, while the mailing prohibition is an ineffective tool for securing these other goals, it is highly effective in protecting recipients from the intrusion of an undesired financial involvement.

Therefore, the form of control enacted seems most responsive to the privacy objective, for, unlike the other forms of regulation considered by Congress, it produces an abrupt termination of the condition that produced dissatisfaction. Enactment of the mailing prohibition is justified only if protection of association is recognized as its primary objective.

B. *The Operational Impact of the Mailing Prohibition*

1. *The Impact on Competition*

The prohibition of the mailing of unsolicited cards is likely to provide individuals with the desired protection from involuntary financial associations, but a question remains whether the prohibition produces negative consequences that outweigh the policies justifying enactment. A potential consequence of particular importance is the extent to which the ban either deters new entrants in the credit card field or limits the growth of existing small issuers. While congressional concern with the possible anticompetitive consequence of the statute was given expression in early versions of S. 721,¹⁰² the final enactment contains no provision responsive to it. This omission suggests the difficulty of securing effective distribution controls while at the same time allowing issuers the relatively free access to markets necessary to support competitive card plans.

An issuer undertaking a card program on a large scale faces significant start-up costs, particularly if its card program is not part of a merchandising operation.¹⁰³ These costs may result in an operating

101. Control of inflation is not as readily achieved by alternative measures. Its "costs" cannot be assessed directly to issuers. Legislative measures, however, could impose an obligation on the issuer to deter inflationary expansion of card credit that would be more likely to achieve the desired result than the restriction adopted. The issuer might, for example, be assigned an aggregate credit limit to be observed in its card program. This could be based on the extent of substituted credit used in the plan or an amount deemed within the limits of reasonable consumer credit growth.

102. The original version of S. 721 provided that the mailing prohibition would take effect six months after the bill's enactment. S. 721, 91st Cong., 1st Sess. § 3 (1969). In addition, the Committee versions required that unsolicited cards that were previously sent could be renewed only upon request. S. REP. NO. 739, 91st Cong., 2d Sess. 6 (1969). Both of these provisions were intended to limit the competitive advantage given to banks with established plans. See 116 CONG. REC. 11832-34 (1970) (debate on Senator Williams' amendment to relax the renewal requirements).

103. A merchandiser is already carrying on sales transactions into which his card may be introduced.

loss during early years.¹⁰⁴ In addition, considerable expense is necessary to maintain an efficient accounting system. Profitability of a card plan is by no means assured, as is evidenced by the abandonment of a number of the earliest bank card plans.¹⁰⁵

Because of the sizable investment and operating costs required, profitability depends upon the participation of a large number of subscribers with active accounts.¹⁰⁶ In order to generate the necessary volume, most nonmerchandising issuers resorted to the mass distribution of unsolicited cards.¹⁰⁷ Issuers realized that many persons who would be requested to join a plan would not be prepared to do so at the time the request was made. Unsolicited cards were distributed because a solicitation that merely invited the recipient to submit an application was likely to be discarded and forgotten before the desire to use a credit card arose. If, on the other hand, the card itself were placed in his hands, a recipient might retain the card and use it when a need for credit occurred. Moreover, receipt of the card made it unnecessary for a person to take the affirmative step of preparing and submitting a formal application form. The incomplete statistics that are available suggest that issuers are correct in believing that the mailing of unsolicited cards attracts more users than distribution of application forms and promotional material.¹⁰⁸ It

104. The Bank of America card plan, for example, did not operate at a profitable level during its first four years, despite the fact that it developed in a market with fewer competitors than presently exists in most cities. Wall St. J., May 24, 1966, at 32, cols. 2-3. A recent survey revealed that start-up costs averaged two per cent of total bank operating expenses, followed by current expenses matching current revenues after one and one-half to two and one-half years, and a complete recovery of start-up costs within three to four years. See FED. RESERVE SYS. REP., *supra* note 3, at 27-28. Programs begun during more recent periods have had similar experiences. 1969 Senate Hearings, *supra* note 39, at 118, 121 (statement of James Brown, Interbank Card Association).

105. See FED. RESERVE SYS. REP., *supra* note 3, at 30. Some have questioned whether the banking industry's original optimism about the profitability of bank card plans was justified. Because of relatively high credit and fraud losses, as well as unanticipated operating costs, one industry representative has observed that "many banks with credit card plans are beginning to adopt the view that the cards do not represent a good profit opportunity." American Banker, April 7, 1971, at 24, col. 1 (statement of John R. Bunting, President, First Pennsylvania Banking and Trust Co.).

106. See Davenport, *supra* note 1, at 225 n.32; FED. RESERVE SYS. REP., *supra* note 3, at 25-27. It is difficult to interest merchants in the plan without a large backlog of subscribers. See 1969 Senate Hearings, *supra* note 39, at 14, 24 (statement of Andrew F. Brimmer, Board of Governors, Federal Reserve System).

107. See FED. RESERVE SYS. REP., *supra* note 3, at 26. Notable exceptions are the early independent card plans—Diners' Club, American Express, and Carte Blanche. These programs not only depend upon applications for participants, but also charge an annual fee, a practice not followed in bank card plans. The card plans of many merchandising issuers, such as oil companies, initially relied upon solicitations of applications, but later switched to unsolicited mailings to selected groups.

108. A study undertaken by Shell Oil Company found that 38.3 per cent of those persons who received unsolicited credit cards eventually used them, while only 14.4 per cent of those from whom applications were solicited ultimately activated card ac-

thus appears that a competitive card program can be more rapidly and cheaply established when cardholders are attracted by distribution of unsolicited cards.

Myriad factors will influence the long-run impact that the ban of unsolicited mailings will have on competition. In many areas, plans had been established prior to the prohibition, and the profit potential for new entrants was already limited. The publicity surrounding the growth of credit card usage has increased the public's familiarity with credit cards and lessened the resistance of potential cardholders formerly encountered.¹⁰⁹ In those areas in which new card plans could operate profitably, other types of promotional efforts to secure applicants may now be more productive. The success of the unsolicited-mailing technique may have led issuers to underestimate alternative marketing approaches. It is clear, however, that the statute has disrupted the operation of the credit card market: small and potential issuers will be forced to resort to distribution techniques that may be more costly than unsolicited mailings.¹¹⁰ Even if experimentation establishes the success of alternative approaches, there is likely to be at least a short-run limitation on the number of new entrants and growth of small issuers, thereby limiting the competition that existing programs will encounter.

2. *The Scope of the Prohibition*

The prohibition of the mailing of unsolicited cards is stated in absolute terms: "No credit card shall be issued except in response to a request or application therefor."¹¹¹ Exceptions are made in two situations for issuances that have been preceded by the holder's acceptance of a card: the prohibition "does not apply to the issuance of a credit card in renewal of, or in substitution for, an accepted

counts. 1969 Senate Hearings, *supra* note 39, at 161. An earlier survey by an issuer bank indicated a similar disparity. Nineteen per cent of unsolicited card recipients activated accounts shortly after receipt, while only 0.66 per cent of those who were sent application forms eventually applied for a card. See FED. RESERVE SYS. REP., *supra* note 3, at 76. This survey does not indicate the extent of card use among applicants. The extent of the disparity in the surveys has been explained as an incident of the early timing of the surveys and the nature of the promotional effort. See 1969 Senate Hearings, *supra* note 39, at 110 (statements of Senator Proxmire and Thomas Bailey, American Bankers Association).

109. Cf. 1969 Senate Hearings, *supra* note 39, at 110 (statement of Thomas Bailey, American Bankers Association).

110. Some segments of the banking industry have expressed this concern. See 116 CONG. REC. 11834 (1970) (letter to Senator Hatfield from The Commercial Bank, Salem, Oregon).

111. 15 U.S.C. § 1642 (1970), set out in note 34 *supra*.

credit card.”¹¹² The former practice of mailing cards to persons whose names were obtained from existing bank accounts, credit card bureaus, or similar sources is no longer permissible. Questions do remain, however, with respect to the breadth of the statutory prohibition.

A marketing technique occasionally used in the past was the negative premailer, a printed promotion stating that a card would be sent to the recipient unless he took affirmative action to inform the issuer that the card was not desired. The question whether a recipient's silence could be interpreted as a “request” under the statutory standard is answered by the legislative history. Proposals to permit such a technique were made at several stages in the evolution of the statutory language.¹¹³ However, in presenting S. 721 on the floor of the Senate, Senator Proxmire specifically noted that it was intended to preclude use of the negative premailer.¹¹⁴ Thus, the application of the prohibition to this practice seems clear.

Solicitations that are permitted include all forms of mail contact requesting the recipient's participation in a plan. As long as affirmative action by the recipient is required to trigger the issuance of a card, the contact will not violate the statutory prohibition.¹¹⁵ An affirmative response made verbally, as in the course of a personal or telephone solicitation, satisfies the statutory standard.¹¹⁶

Considerable attention was given to determining whether to apply the mailing prohibition to a card issued in renewal of a previously issued unsolicited card. In a provision designed to limit the competitive advantage derived by existing firms that had previously issued unsolicited cards, the Senate Committee's version of S. 721 would have required the initial renewal of such cards to be made pursuant to a request.¹¹⁷ This requirement was removed by an amendment on the Senate floor.¹¹⁸ While this history indicates the

112. 15 U.S.C. § 1642 (1970), set out in note 34 *supra*.

113. See, e.g., 1969 Senate Hearings, *supra* note 39, at 114 (statement by Thomas Bailey, American Bankers Association). Letters to Senator Hatfield indicate that he had considered the inclusion of a provision permitting negative premailers. See note 110 *supra*.

114. 116 CONG. REC. 11829 (1970).

115. *Id.*

116. One of the bills introduced in the House specifically provided that cards could be sent only in response to a written request. See H.R. 15103, 91st Cong., 1st Sess. (1969), cited in 1970 House Hearings, *supra* note 14, at 108, 119-20. This measure was not seriously considered, and little attention was given to the requirement of a writing.

117. See 116 CONG. REC. 11827 (1970). See also S. REP. NO. 739, 91st Cong., 2d Sess. 8 (1970).

118. 116 CONG. REC. 11832-34 (1970).

primary import of the renewal exception, the application of the provision in one situation may generate confusion. A renewal card may be issued only for *an accepted card*.¹¹⁹ This term is defined, in part, to mean "any card which the cardholder has requested and received or has signed or has used or authorized another to use."¹²⁰ An unsolicited card would, by definition, not meet the terms in the first conjunctive since it would not have been "requested and received." Mere receipt amounts to acceptance only if a card has been requested; therefore, an unsolicited card would be "accepted" only upon being signed, used, or given to another person for use. While an issuer could identify those persons who had *used* an unsolicited card, the signing of a card or authorization of another's use would not necessarily come to the issuer's attention. An appropriate regard for caution should lead issuers to withhold renewals from all holders of unsolicited cards except those whose cards had actually been used.¹²¹

3. *Enforcement of the Prohibition*

The version of the credit card statute that was finally adopted by the Senate includes no express sanction for disobedience of the prohibition of unsolicited mailings.¹²² While the legislative history of the provision does not indicate the manner in which violations are to be treated, a variety of enforcement tools are available. The credit card statute amended a chapter of the 1968 Truth-in-Lending Act¹²³ designed primarily to compel disclosure of interest and finance charges in consumer credit transactions. The Truth-in-Lending Act, therefore, contains the sanctions that were presumably intended to apply to the limitation on distribution of unsolicited cards. But while there are provisions in the Act for criminal, civil, and administrative enforcement, these do not all apply with equal force to the credit card provisions. The criminal provisions, including punish-

119. 15 U.S.C. § 1642 (1970), set out in note 34 *supra*.

120. 15 U.S.C. § 1602(f) (1970), set out in note 34 *supra*.

121. As might be expected, some banks adhere to a practice of not renewing cards that are not used for extended periods of time. See 116 CONG. REC. 11834 (1970) (letter to Senator Hatfield from The Commercial Bank, Salem, Oregon).

122. While most issuers have complied with the ban, there is still some basis for concern. At least one oil company completed an unsolicited mailing after the effective date of the Act. Interview with Randolph May, law student, Durham, N.C., May 13, 1970. This violation was apparently the result of insufficient information about the existence of the ban. The statutory prohibition has necessitated administrative interpretations in other situations. See, e.g., 4 CCH CONSUMER CREDIT GUIDE ¶¶ 30,664, 30,807 (1972) (excerpts from Fed. Res. Bd. opinion letters).

123. 15 U.S.C. §§ 1601-81t (1970).

ment by fine and imprisonment, may be invoked for any willful and knowing failure to comply with any requirement imposed under that subchapter, which now encompasses the credit card provisions.¹²⁴ The administrative enforcement procedures similarly apply to all requirements imposed under the relevant subchapter.¹²⁵ Violations in industries within the jurisdiction of specified regulatory agencies are enforceable by those agencies. Enforcement efforts against bank credit card plans, for example, are to be undertaken by the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Director of the Federal Deposit Insurance Corporation.¹²⁶ In industries not specifically enumerated, the Federal Trade Commission is granted enforcement power.¹²⁷ While some of these agencies have become actively involved in enforcement of the interest disclosure provisions of the Act, there has been only limited administrative action under the mailing ban. This inactivity may reflect general compliance with the proscription by the credit card industry.

The Truth-in-Lending Act provides civil remedies for violation of its provisions,¹²⁸ but, because of the terminology of the section, private recovery cannot extend to violations of the credit card distribution ban. The civil action is available only when there is a failure to disclose any required information, and therefore cannot be used to remedy violations of the mailing prohibition, which involves no disclosure requirement. The absence of discussion of the enforcement question during the hearings and floor debate makes it uncertain that Congress actually meant to preclude the availability of a private remedy. It cannot yet be determined whether the existence of criminal sanctions and administrative relief provides adequate enforcement alternatives and compensates for the lack of civil remedies.

Although administrative enforcement of the Truth-in-Lending Act is allocated to a diverse group of agencies, authority for the promulgation of interpretive rulings is centralized. While the credit card amendments do not specifically authorize administrative interpretations, a general provision of the Truth-in-Lending Act grants authority to the Board of Governors of the Federal Reserve System to promulgate regulations.¹²⁹ This authority includes the power not

124. 15 U.S.C. § 1611(3) (1970).

125. 15 U.S.C. § 1607 (1970).

126. 15 U.S.C. § 1607(a)(1) (1970).

127. 15 U.S.C. § 1607(c) (1970).

128. 15 U.S.C. § 1640(a) (1970).

129. 15 U.S.C. § 1604 (1970).

only to interpret the Act, but also to make adjustments and exceptions in its operation. The legislative history of the credit card amendments indicates a desire by the Board of Governors to limit its rule-making responsibility in this area.¹³⁰ Nonetheless, the Board continues to have interpretive authority under the amended Act, which now extends to the adopted provisions relating to credit cards. Indeed, the Board has issued amendments to its Regulation Z intended to assist the implementation of the statutory credit card controls.¹³¹

The Board's initial regulations are primarily directed toward the limitation on cardholder liability and present no significant elaboration on the operation of the prohibition of unsolicited mailings. The regulations do, however, detail the manner in which state statutory controls will be approved as an alternative means of regulating mailings. Pursuant to a provision of the Truth-in-Lending Act,¹³² state regulatory schemes will be operative if the Board finds that they impose requirements "substantially similar" to those established by the Act.¹³³ Upon Board approval, transactions subject to state control are exempt from the operation of the Act. It is doubtful that there will be any general effort by states to exercise their option for local control. Prior to the adoption of the federal credit card legislation, only a few states indicated an interest in controlling unsolicited mailings. The statutes enacted attempted to limit cardholder liability for misuse of unsolicited cards and, thus, were more limited in scope than the subsequent federal controls.¹³⁴ Since any

130. See notes 38-40 *supra* and accompanying text. Since the enacted legislation relieved the Board of the responsibility for credit card regulations, that response might be interpreted as indicating the Committee's intention to remove the Board from all responsibility for control of credit cards, including that which would arise under the more general delegation of authority under the Truth-in-Lending Act. The legislative history, however, does not clearly indicate such an intention. The shift from a regulatory scheme to a statutory ban appears to have been as much a result of a desire to make the statute more rigorous as a concession to the reluctance of the Board of Governors. Pressures to strengthen the bill came from several sources, including the Chairman of the Federal Trade Commission. See 1969 Senate Hearings, *supra* note 39, at 38-39 (statement by Paul Rand Dixon, Chairman, Federal Trade Commission). The Committee acknowledged the influence of these suggestions in explaining its decision to abandon the regulatory structure. See S. REP. NO. 739, 91st Cong., 2d Sess. 5-6 (1970). In addition, while the Committee minority assumed that the Board's role had been removed, the floor sponsor of the measure acknowledged the availability of its residual rule-making authority. See 116 CONG. REC. 11842 (1970) (statement by Senator Proxmire).

131. See 36 Fed. Reg. 1040, 1041 (1971).

132. 15 U.S.C. § 1633 (1970).

133. 12 C.F.R. § 226.12(a)(1) (1971), as amended, 36 Fed. Reg. 1040-41 (1971).

134. See, e.g., CAL. CIV. CODE ANN. § 1718 (West, Supp. 1971); ILL. ANN. STAT. ch. 121½, § 381 (Smith-Hurd Supp. 1972); MASS. ANN. LAWS ch. 255, § 12E (Supp. 1971). See generally Kennedy, *supra* note 33, at 44-47. Enactment of the state credit card laws

new state control would likely be substantially duplicative, most policies that would be promoted by state control are satisfied by the federal enactment. The fact that Congress has assumed the initiative in legislating in this area has reduced both the need and incentive for state regulation. State control will probably be exercised only with respect to those businesses traditionally subject to extensive state controls. Since few existing card issuers are of this type, the majority of credit card transactions will no doubt remain subject to direct federal regulation.

III. CARDHOLDER LIABILITY FOR UNAUTHORIZED USE

Unlike the House measures, S. 721 also addressed the problem of cardholder liability for unauthorized use. As ultimately enacted, the statute provides that a cardholder bears no liability for the misuse of his card by another person unless the issuer has previously informed the cardholder of the liability provision, provided a pre-stamped, self-addressed notification-of-loss form, and issued a credit card that contains a means of identifying the authorized user. Even if the issuer satisfies these conditions, the cardholder's maximum liability is fifty dollars and, in any event, the cardholder is not liable for losses sustained after he has notified the issuer.¹³⁵

Prior to the statute, most issuers imposed upon cardholders the legal responsibility for all unauthorized charges made until the cardholder had notified the issuer of the loss.¹³⁶ While issuers often did not in fact seek to hold cardholders responsible to the extent permitted under the cardholder agreements,¹³⁷ this legal framework created the popular assumption that the loss allocation system placed ultimate responsibility on individual cardholders. The statute fundamentally reverses this relationship by placing primary legal responsibility for fraud losses on issuers.

Some question remains, however, as to whether the mechanism chosen for implementation of the new liability system is desirable in light of its probable effectiveness. Achievement of the statutory objectives depends largely upon cardholder awareness of the new

did not silence the complaints by consumers concerning credit card abuses, particularly in the area of invasion of privacy. See 116 CONG. REC. 30876 (1970).

135. 15 U.S.C. § 1643(a) (1970), set out in note 34 *supra*. See also Note, *Consumer Protection—Credit Card Protection Under the Truth in Lending Act*, 49 N.C. L. REV. 775 (1971).

136. See Macaulay, *Private Legislation and the Duty To Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051, 1070, 1080 (1966); Bergsten, *supra* note 2, at 488-97.

137. See note 198 *infra*.

rules that govern use of credit cards. But, dissemination of information about the statute is dependent upon action by the issuer.¹³⁸ Unfortunately, the statute fails to provide an adequate incentive for the desired issuer response and, hence, undermines the effectiveness of the limited liability provisions.

A. *The Rationale of the Statutory Liability System*

The federal credit card statute reflects a policy decision that it is preferable for the issuer to bear fraud losses arising from credit card use. While the legislative history of the Act includes little commentary that documents the basis upon which this choice was made, various considerations suggest its desirability.

A system of issuer liability is preferable because it stimulates more efficient precautions against losses.¹³⁹ If issuers are made to bear fraud losses, they will implement procedures controlling such costs in order to preserve the profitability of their operations. The amount they spend for loss control is a function of the amount of loss experienced: in an optimal situation, issuers will expend money for loss control as long as each additional expenditure results in the prevention of losses of a greater amount. If cardholders were to bear these losses individually, they, too, would respond with preventive measures. But their responses would not be economically efficient; their loss minimization measures would likely include unnecessary and ineffective devices.¹⁴⁰ On the other hand, issuers have superior access to information about the cost, frequency, and causes of fraud losses. In addition, issuers are in a better position to control the occurrence of these losses. They not only select the merchants who may accept the card and the holders who may use it, but also design

138. See note 202 *infra* and accompanying text.

139. The argument is fully explored in Note, *supra* note 100, at 1423-28.

140. The decision to relieve individual cardholders of most responsibility for unauthorized charges, while readily supportable, represents a significant departure from older notions of loss allocation. Common law liability concepts suggest that the cardholder bears such losses because of his likely contribution to their occurrence. The cardholder has control of the card and can seemingly guard against its misuse by limiting the exposure to loss. Thus, because the cardholder is more likely than the issuer to be "at fault" when unauthorized use occurs, he should accept responsibility for his dereliction, even though it may not satisfy negligence principles.

To the extent that the statute continues a limited liability, see text accompanying note 145 *infra*, it recognizes some need to stimulate protective cardholder behavior. But its liability provisions represent a general rejection of traditional analysis. They implicitly recognize that an inquiry into "fault" places too great an emphasis upon the proximity of a party to the loss event. A more appropriate inquiry is the parties' relative loss-control capacity. Viewed in this light, the question of loss allocation can properly take account of the issuer's predominant role in shaping the system that produces fraud losses.

the security systems for card distribution, user identification,¹⁴¹ and loss notification. Hence, the statutory choice of issuer liability assures that the problem of credit card loss is the responsibility of the party most likely to take efficient steps in its resolution.¹⁴²

A system of issuer liability also ensures that fraud losses are spread over a large number of transactions so that the impact on any one cardholder is slight; the issuer initially accepts the loss and then spreads it back to cardholders or merchants in the form of increased service costs. Such a system is desirable because placing primary liability on the holder of a card that is fraudulently used may impose large, and potentially ruinous, costs on individuals.¹⁴³ It is true that under a system of cardholder liability, cardholders could agree among themselves to spread fraud losses; this result is achieved when individual holders are joined together in an insurance plan. However, insurance plans existing prior to the federal enactment indicate the undesirability of this technique, for the insurance cost per card was

141. Photographs, code devices, and voice prints are possible identification techniques. See Bergsten, *supra* note 2, at 506 (photographs); Coha, *Credit Card Fraud*, BANKERS MONTHLY, June 15, 1967, at 24, 26-27 (code devices); Livingston, *Banking's Role in a Credit Card Economy*, BANKING, Sept. 1966, at 111, 112 (voice prints).

142. The loss allocation approach of the statute has been rejected by at least one commentator. After an extensive review and criticism of liability-until-notice schemes, the student author states: "As a basic premise, the most equitable methods [*sic*] of distributing fraud loss is to spread it as evenly as possible among those parties who derive benefits from the credit card system. Since both card issuers and cardholders enjoy reciprocal benefits from the use of credit cards, it would seem reasonable for them to equally absorb losses generated by their misuse." It is then proposed that all cardholders of a particular issuer be assessed a proportionate part of fifty per cent of the fraud losses experienced by the issuer. The remainder would be borne by the issuer itself. See Comment, *The Apportionment of Credit Fraud Losses*, 4 U. CAL. (DAVIS) L. REV. 377, 399 (1971).

In light of the limited attention that has been given to loss allocation questions, this suggestion must be credited for its originality in attempting to resolve a difficult question. The proposed solution must be rejected, however. The relative benefit derived by cardholder and issuer from a credit card system would seem to be an inappropriate foundation for loss allocation; for the evaluation, and indeed definition, of "benefit" is largely normative and is not subject to resolution that withstands objective scrutiny. Relatedly, this approach presumes that the providers and consumers of credit card systems derive a similar utility that permits meaningful comparison, an assumption that is doubtful. Finally, at the basis of the proposed system is the expectation that the cardholders' costs will be limited to those assessed directly. The cardholders' costs cannot, however, be so easily controlled. The issuer remains free to spread all or a portion of the remainder of its losses to cardholders in the form of indirect costs, such as larger merchant discounts, less convenient service, and so on. Under acceptable notions of governmental regulation, it is simply not possible to dictate the extent of cost-spreading in which the issuer will engage. It is, of course, feasible to rely upon competitive pressures to limit the attractiveness of cost-spreading; this is the approach taken by the federal credit card statute. But the result achieved under the statute is much less perfect than that required for the system proposed in the above Comment.

143. 1969 Senate Hearings, *supra* note 39, at 63-75 (statement of Robert Meade, Director, Legislative Affairs, President's Committee on Consumer Interests); Note, *supra* note 100, at 1426 & nn.50 & 52.

significantly higher than that incurred under a more perfect loss-spreading system.¹⁴⁴ Therefore, in order to minimize the impact of each loss occurrence in the most efficient manner, the issuer's superior knowledge and cost-spreading position are a more appropriate basis for a loss distribution scheme.

The new credit card law does not create an absolute issuer-liability system, for the cardholder may be held liable for up to fifty dollars resulting from unauthorized uses. This limited cardholder liability is commonly justified on two bases. First, the prospect of potential liability is intended to operate as an incentive to the cardholder to give the issuer prompt notice of loss.¹⁴⁵ The incentive is provided by the fact that the cardholder may limit his liability to less than the statutory maximum; he bears liability only for unauthorized charges made *prior* to notification. Second, the provision for partial cardholder liability serves to encourage a cardholder to exercise proper care in the use and protection of his card; without such care the amount of fraud loss incurred by the issuer would increase. The congressional objective was to implement a regulatory scheme that limits cardholder liability without at the same time increasing the economic and social costs resulting from unauthorized use of credit cards. The optimal balance in the statutory structure can be obtained if the cardholder incurs only the degree of liability necessary to ensure proper control of his card and prompt notice of loss to the issuer.

144. Note, *supra* note 100, at 1427-28.

The author estimated that the average loss per card is \$0.25 per year. Assuming that the average family has six credit cards, insurance costs range from \$0.45 per card for minimum protection to \$1.33 per card for coverage adequate in most cases.

The estimate of \$0.25 fraud loss per card may be too large. It was based on an assumption of then current nationwide fraud losses of 50 million dollars, *TIME*, Nov. 24, 1967, at 80. The absence of a systematic method for calculating such losses is reflected in the disparity of other contemporary estimates. The range has been placed at 20 to 30 million dollars, Bergsten, *supra* note 2, at 487; 40 million dollars, Maidenberger, *Personal Finance: Holders of Credit Cards Are Warned That Losing Them Can Prove Costly*, *N.Y. Times*, Sept. 18, 1967, at 69, col. 3; 20 to 50 million dollars, Coha, *supra* note 141, at 24. More recent estimates have run as high as 150 million dollars, *1970 House Hearings*, *supra* note 14, at 3 (statement of Representative Nix).

The fraud losses of the Midwest Bank Card System, after start-up difficulties had been overcome, has been stated to be 0.12 per cent. *Id.* at 91, 97 (testimony of Earl Pollock, Midwest Bank Card System, Inc., characterizing its recent performance as "enviable"). If this figure were projected over the entire industry for 1967, see note 45 *supra*, nationwide fraud losses for that year would have been approximately 14 million dollars. In fact, 1967 fraud losses may have been considerably higher due to the initial experience of the Chicago banks, see notes 9-30 *supra* and accompanying text. The statistics available for most issuers do not distinguish between fraud and credit losses. See *FED. RESERVE SYS. REP.*, *supra* note 3, at 32; *1970 House Hearings*, *supra* note 14, at 230 (report of losses by Shell Oil Co.)

145. Note, *supra* note 100, at 1426. See also *1968 Senate Hearings*, *supra* note 37, at 71, 73 (statement of Professor Willier, National Consumer Law Center, Boston College);

In seeking this balance, difficulties are encountered in determining the level of exposure to loss necessary to produce the desired cardholder response. The statute provides that a cardholder may bear up to fifty dollars liability for each card that he owns. If a number of cards are lost at one time, the aggregate loss faced by the cardholder may be significant. The liability necessary to induce notice and care is probably not related to the number of cards lost. A potential liability sufficient to stimulate cardholder action when one card is lost should suffice to prompt the same response when three or four cards have been lost. While this suggests that it may have been preferable to establish a potential liability for each incidence of loss rather than for each card involved, such a scheme would create significant administrative difficulties. In the event of loss of several cards, a number of different issuers would have potential claims against the cardholder. If the latter's liability were limited to fifty dollars, it would be necessary either to divide the amount of liability between several independent claimants or to select an issuer whose claim was to be preferred. The operating costs of such a system might be excessive and, to the extent that distribution of cardholder loss results in a complicated administrative structure, the potential for confusion among cardholders as to their responsibility for loss is increased.

B. *The Operation of the Statutory Liability Limitation*

Once the decision has been made to limit a cardholder's liability for unauthorized use, a mechanism to effectuate that choice is necessary. The provisions of the federal credit card statute attempt to define the scope and operation of the new cardholder protection. Legislative directives have been provided for many of the policy choices that have to be made. Thus, the drafters sought to define the information that issuers must convey to cardholders,¹⁴⁶ the steps cardholders must take in giving the issuer notification of the loss of a card,¹⁴⁷ and the types of credit devices subject to statutory

1970 House Hearings, *supra* note 14, at 225, 226-27 (submission of W. J. Bittles, Jr., General Manager of Retail Marketing, Shell Oil Co., urging the adoption of a \$100 liability limit).

146. 15 U.S.C. § 1602(j) (1970), set out in note 34 *supra*. The Federal Reserve Board has indicated that acceptable notice may take the following form:

You may be liable for the unauthorized use of your credit card (or other term which describes the credit device). You will not be liable for unauthorized use which occurs after you notify (name of card issuer or his designee) at (address) orally or in writing of loss, theft, or possible unauthorized use. In any case liability shall not exceed (insert—\$50 or any lesser amount under other applicable law or under any agreement with the cardholder).

36 Fed. Reg. 1041 (1971).

147. 15 U.S.C. § 1643(a) (1970), set out in note 34 *supra*. The Federal Reserve Board

control.¹⁴⁸ There are, however, a number of questions concerning the operation of the statute that have not been adequately resolved. In many areas, insufficient attention was given to the potential difficulties that might arise in implementation. Several of these problem areas involve matters of fundamental importance in achieving a workable statutory scheme. The discussion that follows pursues some of the important questions raised by the statute.

1. *Transactional Exemption for Business Use*

The federal credit card enactment was added as an amendment to the previously adopted Truth-in-Lending Act. This graft of the credit card provision onto a statute designed to control other credit-

has interpreted the statute to mean that the preaddressed, prestamped, notification-of-loss form provided by the issuer is not the exclusive means by which notification may be given, 36 Fed Reg. 1041 (1971). The Board's Regulations also provide that a notice made in writing "shall be considered given at the time of receipt or, whether or not received, at the expiration of the time ordinarily required for transmission, whichever is earlier." *Id.*

148. 15 U.S.C. § 1602(k) (1970), set out in note 34 *supra*. The applicability of the fifty-dollar liability limitation to traditional credit cards such as oil company and bank cards is clear, but its effect upon other types of instruments requires analysis of the statutory definition. An illustrative device is the card issued to telephone subscribers. Although popularly referred to as "credit cards," these have a different function than the traditional charge plate. The latter must usually be submitted to the merchant at the time of sale, but telephone services may be purchased on the mere oral presentation of information on the card. Requests for service are accepted without the issuer or seller verifying the existence of a card. That which entitles the user to credit is not the card itself, but rather the information on it. Since the card itself is not needed to transmit that information, such "card" does not appear to exist "for the purpose of obtaining money, property, labor, or services on credit" as required by 15 U.S.C. § 1602(k) (1970).

The nature of the statutory scheme further suggests that it was not intended to apply to telephone "credit cards." While the drafters required that issuers include on the card a means of identification, the techniques contemplated were such things as signature blocks and photographs. *See 1968 Senate Hearings, supra* note 37, at 80, 85, 92 (testimony of Professor Bergsten, University of Iowa, College of Law); 116 Cong. Rec. 11841 (1970) (statement of Senator Percy). These techniques will not prevent loss when the card itself is not presented during the transaction. The intent seems to have been to cover only cards on which more reliable identification techniques would protect the authorized user against loss. Such an identification mechanism might be devised for telephone cards, but the legislative history does not indicate that Congress had one in mind. The implication is that only the traditional cards are included within the statutory coverage.

Other identification devices raise similar questions. For example, many banks issue check guarantee cards that resemble credit cards in their size and content. They enable the holder to cash checks with merchants or banks with whom the holder has had no previous contact. Under some guarantee plans, the holder may use the card to cash a check even though an overdraft is created in the account. A card that gives this privilege may be said to exist "for the purpose of obtaining money . . . on credit," even if a particular holder uses his guarantee card only when his checking account balance is sufficient to cover the checks he writes. In the more typical plan, however, the card is only identification, and the user is not permitted to overdraw his account. The check guarantee card that gives no credit privilege is not within the statutory definition, and its misuse is not subject to the statutory limitations.

related practices has produced significant interpretive problems. For example, the Truth-in-Lending Act exempts from its coverage "[c]redit transactions involving extensions of credit for business or commercial purposes . . . or to organizations."¹⁴⁹ The credit card statute does not offer specific directives concerning the manner in which the liability limitations are to be applied to cards that are used for both business and nonbusiness purposes; the common practice of using one card for these dual purposes increases the importance of the interpretation given to the transactional exemption.¹⁵⁰

A threshold question in the determination of the application of the transactional exemption to these hybrid cards involves identification of the point at which an "extension of credit" is made. In the amended statute, the term "credit" is defined to include "the *right* . . . to incur debt and defer its payment."¹⁵¹ Therefore, credit exists under the statute not only when a current purchase is made, but also in situations where the right to defer payment extends to future or potential indebtedness. As applied to credit cards, this suggests that credit is extended at the time the card is issued, for that event creates the cardholder's right to apply the card to deferred payment purchases. By issuing the card, the credit card company has endowed the holder with authority to establish a debtor relationship with the issuer.¹⁵²

Under this interpretation of "extension of credit," the application of the statutory exemption is clear in some cases. For example, the Federal Reserve Board expressed the view that the liability lim-

149. 15 U.S.C. § 1603(1) (1970).

150. The Federal Reserve Board has indicated that it regards the business-purposes exemption of section 104 as applicable to transactions involving credit cards. See 4 CCH CONSUMER CREDIT GUIDE ¶ 30,682 (1971) (excerpts from Fed. Res. Bd. letter of June 3, 1971, No. 483, by Griffith L. Garwood, Chief, Truth-in-Lending Section); *id.* ¶ 30,708 (excerpts from Fed. Res. Bd. letter of July 15, 1971, No. 505, by Griffith L. Garwood). But a hearing examiner for the Federal Trade Commission has rejected a similar contention made by a firm attempting to justify its promotion of a credit card protection scheme. See Credit Card Serv. Corp., 3 TRADE REG. REP. (Trade Cas.) ¶ 19,967, at 21,987, 21,988 (April 13, 1972).

151. 15 U.S.C. § 1602(e) (1970) (emphasis added).

152. It would be possible to argue that credit is extended not at the time of issuance of a card, but rather at the time the card is actually used to purchase goods and services. This theory leads to unreasonable results when applied to doctrines of credit card misuse. Assuming that an unauthorized user makes purchases for his business or commercial purpose, under this view the limited-liability provisions of the credit card statute would not be available to the cardholder because the card had been used for business or commercial purposes. Aside from the difficulties attendant to any theory relying on the subjective intent or purpose of an unauthorized user (a class of persons notorious for their unavailability at the time their testimony is needed), an interpretation of the statute that would deny the statutory protection to a cardholder according to the purposes for which a thief used the credit card stretches the business purpose envisioned by Congress beyond the breaking point.

itation is inapplicable to credit cards that can be used only in connection with business activity.¹⁵³ The limitation to business use may be established upon issuance of the card either from the nature of the card or from limitations established by the cardholder. Illustratively, the card may be issued to business firms solely for use by employees in business related travel and entertainment.

In many situations, however, it cannot be determined at the time of issuance whether a card represents an extension of credit for business or commercial purposes. Many individuals secure general purpose credit cards and use them to make both personal and business purchases. The statute does not provide guidance for determining its application to situations involving mixed uses. This may therefore be an appropriate occasion for the Federal Reserve Board to exercise its rule-making authority. The availability of liability protection could be determined by the purpose for which the card is primarily or most frequently used. Under this standard, occasional or insubstantial personal use would not be sufficient to defeat the statutory exclusion.¹⁵⁴ The test would be most difficult to apply—and justify—in situations where business and personal uses were nearly evenly divided.

Some cases obviously will raise difficult evidentiary problems. The cardholder, who has principal control of the evidence relevant to a determination of the purpose of his prior uses, also has a strong incentive to characterize his uses to fall within the coverage of the statute.¹⁵⁵ In addition, when the unauthorized use occurs before the card has been used extensively, there may be no pattern of usage sufficient to provide evidence of the cardholder's primary purpose in securing the card. In this situation, the cardholder's own classification of his intention may provide the sole basis for determining applicability of the statute.

153. See 4 CCH CONSUMER CREDIT GUIDE ¶ 30,682 (1971) (excerpts from Fed. Res. Bd. letter of June 3, 1971, No. 483, by Griffith L. Garwood).

154. In most cases, the facts necessary to determine the predominant use can be obtained by reference to the cardholder's history of use.

155. There are other considerations apart from the statute that will affect both the cardholder's characterization of his use and the availability of tangible evidence of prior uses. In many situations, the cardholder will seek to classify charges incurred with a credit card as business expenses in order to take advantage of the federal income tax deduction. See INT. REV. CODE of 1954, §§ 162(a), 212. In addition, since most business deductions must be supported by adequate documentation, the tax law creates an incentive for the cardholder to preserve sales slips and other evidence of the nature of the transaction. See, e.g., INT. REV. CODE of 1954, § 274(d). Thus, with respect to authorized charges, the cardholder will typically have an interest in categorizing his business uses as such. However, if a particular card has been misused, the incentives created by the tax law may disappear in light of the advantage that the cardholder receives from opposite characterization of his uses. While the cardholder's past tax records may

As long as a distinction is maintained between business and consumer transactions, there is the potential for confusion among cardholders regarding the availability of the statutory protection. If he were aware of the nonavailability of the liability limitation, a cardholder might segregate his business card accounts and take special measures to protect them from loss. He might, for example, insure his business cards or exercise particular care in handling them. It would seemingly be appropriate for the Federal Reserve Board to devise regulatory measures to protect the cardholder's interest in these situations. The Board should require the card issuer to disclose the statutory exemption for business use to its cardholders. The issuer might also be compelled to offer an option of establishing a separate account for business transactions.¹⁵⁶ Other protections could be achieved through judicial construction of the statute. The issuer could be made to bear the burden of showing that the test for determining statutory coverage had not been met.¹⁵⁷ In addition, an issuer who had informed cardholders that they had only limited liability for unauthorized use might be precluded from subsequently asserting the inapplicability of the statute. Unfortunately, such a rule will further reduce the already inadequate incentive for issuer participation in the disclosure scheme.¹⁵⁸

Although the treatment of business transactions may be clarified by administrative rule-making, the legislative history of the credit card provision reveals no explicit recognition of this limitation by

not be subject to manipulation, there nonetheless will be many situations in which the cardholder will respond to the incentive of the credit card law—as where the acquisition of a particular card is fairly recent, the cardholder has chosen not to itemize his tax deductions, and so on.

156. While this option may be presently available, the measure suggested would be structured to ensure publicity of the option to the business user.

157. This result draws some support from statutory provisions allocating the burden of proof in related controversies. The issuer bears the burden of showing "that the use was authorized or, if the use was unauthorized . . . that the conditions of liability . . . set forth in [§ 1643(a)] have been met." 15 U.S.C. § 1643(b) (1970), set out in note 34 *supra*. While this provision does not address itself to the burden of proof in situations not covered by the statute, it presents a congressional preference for offering further protection to cardholders by requiring issuers to make the affirmative showing of their right of recovery.

It might be argued, of course, that Congress intended this additional protection to apply only when the statute was otherwise applicable and that, by implication, the burden of proof should rest on the cardholder in other situations. However, when the issue of statutory coverage is itself in question, it seems consistent with the general congressional design to create a procedural rule that will offer maximum protection to cardholders.

158. See notes 195-208 *infra* and accompanying text. However, by protecting issuers who do accurately explain the limitations on statutory coverage, such a construction may make it worthwhile for issuers to disclose openly the exemption to their cardholders.

Congress,¹⁵⁹ and policy considerations do not necessarily support the distinctions drawn between business and personal use. For example, the evidentiary difficulties generated by application of the business exclusion may impair the efficiency with which cardholder protections are administered. A more fundamental objection is that the business nature of usage does not necessarily provide a rational basis for denying the protection of the Act. The potential for burdensome cardholder liability may be equally great whether the card is used for personal or business purposes. Thus, an individual cardholder may be unable to absorb any significant fraud loss regardless of whether it flows from a business rather than a personal credit card.¹⁶⁰ While some businesses obligated to accept liability for unauthorized uses will be able to spread such losses adequately, that ability is not a necessary result of the cardholder's commercial status. Moreover, the business nature of the user is irrelevant to the relative capacity of the cardholder and issuer to control losses. Even businesses with a good loss-spreading potential are likely to be less efficient loss controllers than card issuers.¹⁶¹

In order to achieve the statutory objective of consumer protection, the business credit cards of the cardholder should also be covered by the statutory liability limitation. Requiring the business-

159. Neither the hearings nor the floor debate indicate that enactment of S. 721 was undertaken with an appreciation of the effect of the business purpose exemption of 15 U.S.C. § 1603(1) (1970). Indeed, one source involved in the legislative evolution of the Senate bill has implied that no such limitation was intended, utilization of the framework of the Truth-in-Lending Act being only a matter of "drafting convenience." 36 CONSUMER REPORTS 645 (Nov. 1971). The caption of S. 721 may suggest the contrary, however; it describes the bill as one "to safeguard the *consumer*." S. 721, 91st Cong., 1st Sess. (1969) (emphasis added). Many of the statements made in support of the measure considered only its effect on consumers. See 116 CONG. REC. 11828, 30874-77, 30884-85 (1970).

While the classification "consumer" need not conclusively denote only personal activities to the exclusion of those of a business nature, the association has been made in both common parlance and unrelated statutes. See, e.g., UNIFORM COMMERCIAL CODE § 9-109(1) (consumer goods defined as those purchased primarily for personal, family, or household use).

160. In many situations, the cardholder has the attributes of both a businessman and a consumer in that he accepts responsibility for both types of transactions. While the purpose of the credit card provisions was to afford financial protection to consumers, the protection given the cardholder in his consumer activities may be readily undermined by the absence of protection for his business activities. Thus, the consumer affairs of the junior executive who loses his business air-travel card may be completely disrupted if he has to absorb losses for subsequent unauthorized uses of his card. It is true that in most situations charges against business cards of corporate employees may initially be paid by the firm. However, since the statute does not prevent the corporate cardholder from transferring liability back to the authorized card user, the firm may seek to hold the individual employee responsible for card misuse.

161. Cf. notes 139-44 *supra* and accompanying text. The card issuer presumably could also control business card losses more efficiently.

man to bear the responsibility for unauthorized card uses unnecessarily muddles the congressional scheme of loss allocation. Since no strong policy supports application of the transactional exemption to the credit card amendment, the operation of the statute should be modified, by congressional amendment or by Federal Reserve Board rule, to permit the application of the liability limitation to business credit cards.

2. *The Determination of Agency Status*

The three traditional agency concepts of actual, implied, and apparent authority are employed to determine those instances when cardholders receive the insulation of the limited liability provisions of the statute.¹⁶² If the unauthorized user of the card does not have authority in one of these forms, the cardholder will incur no more than fifty dollars liability, provided he secures no benefit from the transaction. The use of the agency framework in the credit card statute is unfortunate in some respects. Many agency concepts were originally developed to characterize relationships created in a business context. The relationship that leads to use of a credit card by persons other than the cardholder is often much more personal. Thus, such concepts as authorization and manifestation suggest a formality that does not usually exist in credit card transfers. Moreover, the body of case law that gave rise to agency principles does not speak directly to the types of situations in which one relinquishes control of a simple, readily accepted credit device. Despite its commercial origins, however, the law of agency does admit of considerable flexibility, a characteristic that may ultimately be employed to minimize interpretive difficulties.

The concepts of actual and implied authority are closely related.¹⁶³ They refer to the "power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him."¹⁶⁴ The determinant of this power, and the characteristic that distinguishes it from apparent authority, is the manifestation made by the principal directly to the agent. A specific direction given by the principal creates actual or express authority. But often the principal does not specify in detail

162. 15 U.S.C. § 1602(o) (1970), set out in note 34 *supra*.

163. Indeed, the statutory usage counters a trend to join the two terms under the general concept of "authority." See RESTATEMENT (SECOND) OF AGENCY § 7, comment c (1957).

164. *Id.* § 7. See also W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 8 (1964).

what an agent may properly do; thus, the limitation of the agent's authority is often supplied by an inductive process. The principal will be bound not only by the transaction that he directly authorized his agent to enter, but also by other transactions that were by implication condoned in the original grant. The scope of the power that will be implied is determined by the generality of the actual manifestation, custom, and the relationship of the parties.¹⁶⁵

Without an initial manifestation by the cardholder, there can be no implied authority for use. Consequently, when the actual user of the card has stolen the card or picked it up after the cardholder has misplaced it, the concepts of actual and implied authority have no application. But many situations arise in which the cardholder gives someone limited permission to use his card.¹⁶⁶ These instances may require a determination of the scope of proper uses that may reasonably be implied. Since a card may be used to purchase a variety of merchandise at a number of outlets, it is necessary to determine whether there are limitations on the types of goods and services that may be secured, the locations in which the card may be used, the amount of charges that may be incurred, or the number of uses that are contemplated. Illustratively, assume that *A* lends *B* his car and gasoline credit card and tells *B* that he may use the car to take his family on a Sunday afternoon pleasure drive. The transfer does not give *B* implied authority to use the card for lodging or to purchase food. More difficult questions, however, are whether the card may be used for automotive products and services other than routine purchases of gasoline and oil. Since the contemplated trip is of short duration, there is probably no implied authority for periodic servicing, such as oil changes. Should a minor defect develop, such as a flat tire, the card could seemingly be used in order to allow *B* to complete his return trip. But because *A*'s largess did not contemplate extended use or expensive purchases, there would likely be no authority to use the card for major repairs. Unfortunately, since the initial manifestation of consent for credit card use is often made informally, it typically will not produce an extensive statement of the user's actual authority. Hence, to determine the extent of implied authority, an attempt must be made to construct a relationship between the parties. The multitude of agency cases provide a basis for analogies. But, as the above example illustrates, situational pecu-

165. RESTATEMENT (SECOND) OF AGENCY § 7, comment *c* (1957).

166. See *Neiman-Marcus Co. v. Viser*, 140 S.2d 762 (La. App. 1962); *Socony Mobil Oil Co. v. Greif*, 10 App. Div. 2d 119, 197 N.Y.S.2d 522 (1960); *Magnolia Petroleum Co. v. McMillan*, 168 S.W.2d 881 (Tex. Civ. App. 1943).

liabilities will ultimately determine the scope of actual and implied authority.

Actual and implied authority may, however, be of little importance in the majority of cases involving the limited liability provision. The concept of apparent authority may make it unnecessary to refine precisely the limits of implied authority. Apparent authority, like the other agency concepts, is created by a manifestation of the principal, but unlike actual and implied authority, the basis of apparent authority is a manifestation to the party with whom the agent deals. More specifically, it is an expression that reasonably leads the party to believe that the actions of another will bind the principal.¹⁶⁷ Because the scope of this authority is determined from the perspective of the person providing the goods or services, the limits of authority to which the principal and agent expressly agreed or which may be implied from their relationship are not necessarily controlling. Rather, the important factor is the appearance of authority that the principal allows to develop.¹⁶⁸

In many instances of credit card use by persons other than the cardholder, the fact that the user was given even a modicum of authority to use a card will significantly affect whether the user's apparent authority extends beyond the originally intended authorization. Despite the absence of direct contact between the cardholder and the merchant who honors it, authorized control of the card by the user may itself be a sufficient manifestation to others to create an obligation in the cardholder. An important element of this creation of apparent authority is the cardholder's initial consent to the transfer and use. Thus, although specific agency precedent is lacking, it is unlikely that mere possession of the card would be regarded as a manifestation attributable to the cardholder where his relinquishment was involuntary, as in the case of theft.

It is traditionally posited that the agent's possession of property may create authority for him to deal with it if "other facts" are present.¹⁶⁹ Several characteristics of credit card transactions supply those facts. The credit card is a device designed to secure goods and services upon credit; mere use of the card provides no occasion for suspicion by a merchant. Moreover, by custom, credit cards are freely accepted in commercial transactions. The cardholder who relinquishes possession should reasonably anticipate that the card might

167. RESTATEMENT (SECOND) OF AGENCY § 8 (1957); W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 8, at 13 (1964).

168. See RESTATEMENT (SECOND) OF AGENCY §§ 27, 49 (1957); W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY §§ 18, 22 (1964).

169. See RESTATEMENT (SECOND) OF AGENCY § 49, comment *d* (1957).

be presented in payment for a wide range of goods or services. When he does not intend that result, the cardholder may be obligated to take steps to ensure that others are aware of the limitation he intends.¹⁷⁰ Therefore, although the cardholder may desire to grant only limited authority for use, he should appreciate that once control of the card is relinquished little can be done to confine the use of the card to those transactions originally contemplated. From the perspective of the merchant who will be asked to honor the card, authority for particular limited uses cannot be distinguished from general authority, unless, of course, the merchant has knowledge of other circumstances that limit the user's authority.¹⁷¹

Two cases decided prior to enactment of the federal credit card statute suggest a judicial inclination toward this view that the cardholder bears liability for all reasonable purchases made by another who has been given control of the holder's card. In *Neiman-Marcus Co. v. Viser*,¹⁷² the cardholder gave his card to his wife upon the commencement of their short-lived marriage, and subsequently paid for one series of purchases charged against his account. Two months later, the couple separated, but three days thereafter the cardholder's wife made the additional purchases that were the subject of the litigated collection effort. The court, viewing the liability question as resolved by agency principles, concluded: "The delivery of the 'Charga-Plate' by Viser to his wife constituted an authorization for the purchases made by her and for their charge to his account."¹⁷³

170. Results in particular cases will be affected by the user's ability to create an appearance of authority by representations of his power to act. See RESTATEMENT (SECOND) OF AGENCY §§ 27, comment c, & 165 (1957). Under section 165, the principal is liable if the user-agent has apparent authority and subsequently represents to a third person that he has authorized control of the card. *Id.* § 165, comment a. However, the principal's liability never arises if the third person has reason to know that the agent is not acting for the principal's benefit. *Id.* § 166, comments c & d.

171. For example, if an employee of the cardholder has repeatedly used the latter's card to purchase gasoline and oil for a company automobile from a particular service station operator, the limited nature of these purchases may negate the reasonableness of a belief by the operator that the employee has authority to use the card to purchase service for his own automobile. But as to other merchants with whom the employee has not previously dealt, authorized possession of the card may be a manifestation sufficient to support liability for most other uses. Other limitations upon cardholder responsibility may appear in particular circumstances. The nature of typical credit card uses presents one such limitation. While a card potentially might be used to acquire anything that an issuer may permit, custom suggests that a merchant should conclude that there is apparent authority only for purchases that are not of abnormal size or frequency in relation to the likely consumption patterns of the nominal cardholder. Hence, if the user made many large transactions in a short period of time, or bought goods in unusual quantities, it might be found that the cardholder's manifestation could not reasonably encompass such transactions. *Cf. Duke v. Sears, Roebuck & Co.*, 433 S.W.2d 919 (Tex. Civ. App. 1968).

172. 140 S.2d 762 (La. App. 1962).

173. 140 S.2d at 765.

*Magnolia Petroleum Co. v. McMillan*¹⁷⁴ reaches a similar result with respect to charges made by two persons to whom the cardholder had given his oil company card. Although initial charges made against the card were for the benefit of the holder, the cardholder unsuccessfully resisted liability for purchases for which he received no benefit and that were made after he attempted to dissuade his transferees from continued use of the card.¹⁷⁵ In both of these cases, the court held the cardholder liable despite violation of express or implicit limitations upon the scope of permissible uses of the actual user. Having knowingly and approvingly relinquished control of a credit card, the cardholder was responsible for all charges until he took appropriate action to terminate the apparent authority. Because it incorporates the concept of apparent authority, the federal credit card law is likely to be applied with a similar analytical result.

3. *Unauthorized but Beneficial Use*

A superficial reading of the statute suggests that if the issuer has complied with the statutory requirements, a cardholder has some liability for all subsequent uses of his card. Under this construction, the extent of cardholder liability is dependent upon whether the use is unauthorized. If it is unauthorized, the cardholder is responsible for no more than fifty dollars of the charges improperly made. It would seem to follow that if the transaction is not unauthorized, the cardholder bears full liability even though the transaction involves use of the card by a third party. While this assessment of credit card liability has the seeming certainty of obviousness, a closer analysis reveals that there may be intermediate situations in which a use does not meet the statutory definition of unauthorized use, but nonetheless does not warrant the imposition of liability on the cardholder for the total value of the transaction.

The statute establishes a conjunctive relationship between the absence of authority and benefit to the cardholder; a use is "unauthorized" by statutory definition only if undertaken by another party acting without authority *and* if the cardholder receives no benefit.¹⁷⁶ It follows by implication that an "authorized" use is either one in which the user has authority *or* one from which the cardholder receives benefit. Thus, the statute can be read to mean

174. 168 S.W.2d 881 (Tex. Civ. App. 1943).

175. The court did not frame the relationship of the cardholder and his transferees in agency terms. Moreover, the decision was aided by a contract term that obligated the holder for all charges made prior to the return of the card. 168 S.W.2d at 881.

176. 15 U.S.C. § 1602(o) (1970), set out in note 34 *supra*.

that the mere receipt of benefit from another's unauthorized use, even when conferred without authority, obligates the cardholder to reimburse the issuer. Under this interpretation, the extent of cardholder liability would not be subject to the statutory limitation because the definition of an unauthorized use would not have been satisfied; while there was no authority for the use, the situation was not one "from which the cardholder receives no benefit."¹⁷⁷ Hence, this view seemingly presumes that the cardholder's liability would extend to the full amount of the charges.

Despite the symmetry of this interpretation, courts should avoid the temptation to base a finding of full liability upon the mere receipt of benefit by the cardholder. Such an interpretation can be rejected on a number of grounds. Properly viewed, the statute was not intended as a complete guide for determining the liability of a cardholder for transactions undertaken with his card by other persons. The credit card legislation is not designed as a comprehensive statement of cardholder liability for authorized transactions; rather, the definitions were structured to deal only with problems peculiar to unauthorized uses. Significantly, the legislative history of the measure indicates no congressional intention to impose full liability for misuses simply because they produce benefit. Drafters of the legislation apparently assumed that a cardholder would have at most only partial liability for the fraudulent diversion of his card.¹⁷⁸ Finally, and most importantly, the notion that mere receipt of benefit renders one fully liable runs counter to significant—and desirable—precedent that has developed under the law of restitution. If a benefit is not returnable, as will most likely be the case when credit card purchases are involved,¹⁷⁹ there is considerable support for relieving the unsuspecting beneficiary of liability. It is generally accepted that while an individual who himself secures services from another by fraud is clearly accountable, one receiving nonreturnable benefits of another's fraud incurs no liability.¹⁸⁰ Other more general

177. 15 U.S.C. § 1602(o) (1970), set out in note 34 *supra*.

178. See S. REP. NO. 739, 91st Cong., 2d Sess. 8 (1970); 116 CONG. REC. 11829-30, 11842 (1970) (comments of Senators Proxmire and Percy).

179. Although precise statistics on the types of purchases made with credit cards are not available, many of the purchases made by unauthorized users will either be services that are immediately consumed or goods that the user appropriates for himself. Neither of these situations presents the interpretive difficulty discussed here. Illustrative of the definitional problem, however, is a case in which the unauthorized user secures repairs or services for the cardholder's property—his car, appliances, or similar items. Such a case will most probably involve an unauthorized user who is a member of the cardholder's family, a fact that may justify the application of principles other than those discussed in the text. See notes 185-86 *infra* and accompanying text.

180. See RESTATEMENT OF RESTITUTION § 40, comment *b* (1936). This conclusion is underscored by an illustration to comment *b*:

principles confirm this result. Thus, liability for restitution will not be found if the cardholder-beneficiary did not have an opportunity to decline the benefit before it was performed,¹⁸¹ to negotiate the terms of the performance,¹⁸² or to disaffirm the performance after its completion.¹⁸³ A similar result can be expected if the benefit did not satisfy a legal or moral obligation of the cardholder.¹⁸⁴

Most situations involving unauthorized card use will not raise the question of the effect of the cardholder's receipt of benefit. When it does arise, it will likely involve an unauthorized user who is a member of the cardholder's family. Unfortunately, the statute is particularly susceptible to an erroneous reading in this situation. Many issuers apparently feel that a cardholder should be held responsible for misuse of his card by anyone within his household. Indeed, an issuers' association has suggested that the reference to an absence of benefit in the definition of "unauthorized use" was intended to exclude from the statute uses "by a member of the family or household of the cardholder."¹⁸⁵ There is, however, no evidence that such misuses were intended to be excluded as a class. The mere fact of a familial relationship between cardholder and user does not suggest a basis for imposing liability, and these cases should be treated under the same principle that governs other applications of the statute. The cardholder will be liable in many of these situations because the family member's use is accompanied by sufficient indicia of authority to bind the cardholder. Other cases may present facts that justify imposing full liability upon the cardholder, as where the unau-

Representing that he is the employment agent of A, but in fact without power to bind A, B employs C to remodel A's house in A's absence. A has never requested such work to be done. C is not entitled to restitution from A for the value of work upon or materials incorporated into A's house.

While a few cases suggest a contrary result (*see, e.g.*, *First Natl. Bank v. Oberne*, 121 Ill. 25, 7 N.E. 85 (1886)), most are in agreement. *See, e.g.*, *Goldberg v. Ford*, 188 Md. 658, 53 A.2d 665 (1947); *Davis Estate v. West Clayton Realty Co.*, 338 Mo. 69, 89 S.W.2d 22 (1935); *Green v. Messing*, 236 App. Div. 107, 258 N.Y.S. 82 (1932); *Cascaden v. Magryta*, 247 Mich. 267, 225 N.W. 511 (1929).

181. *See Wade, Restitution for Benefits Conferred Without Request*, 19 VAND. L. REV. 1183, 1198-99 (1966).

182. *See* RESTATEMENT OF RESTITUTION § 40, comment *a* (1936).

183. *Id.* § 40, comment *b*.

184. *Id.* §§ 40(d), 112-17 (1936).

185. 1969 Senate Hearings, *supra* note 39, at 156, 159 (statement of Midwest Bank Card System, Inc.). Issuers and their attorneys have recognized the special problems raised by intrafamily disputes involving credit cards. *See, e.g.*, R. CLONTZ, TRUTH-IN-LENDING MANUAL 210-11 (Supp. 1972); Murray, *A Legal-Empirical Study of the Unauthorized Use of Credit Cards*, 21 U. MIAMI L. REV. 811, 830 (1967); South, *Legal Steps and Pitfalls in Bank Credit Cards*, 87 BANKING L.J. 222, 236-37 (1971); 1969 Senate Hearings, *supra*, at 103, 106 (testimony of Thomas Bailey, American Bankers Association).

thorized family user secures necessities that the cardholder might have otherwise been obligated to provide.¹⁸⁶ But these can be dealt with under general agency and restitutory concepts, and do not undermine the broad principle that the statute is not properly read as giving rise to general cardholder liability upon mere receipt of benefit.

The question remains as to what the cardholder's liability should be for another's use which, although without authority, produces a nonreturnable benefit to the cardholder. While, as suggested above, total liability is inappropriate, the cardholder's liability cannot be limited by a literal application of the statutory provisions because the presence of benefit means that the use is not "unauthorized." It might be held that the cardholder has no liability at all, but this result is anomalous in light of the whole liability scheme of the statute that allows the imposition of a portion of fraudulent charges on the cardholder. Instead, the statutory reference to "benefit" could be construed in a restrictive sense to mean only such benefit as would give rise to a restitutory obligation. Thus, a use would be unauthorized, and subject to the statute, if it were without authority and produced no benefit for which the cardholder would be obligated under general principles of restitution. Because this construction is not evident from the face of the statute, there is a substantial possibility that it would not be uniformly applied. Hence, the most certain solution would be an amendment to the statute incorporating this restitutory concept of benefit.

4. *The Role of Negligence*

The above discussion suggests that a cardholder would not often be protected by the limited liability provisions for purchases made by a person having authorized control of the holder's card. Among the policy considerations supporting this conclusion is the fact that the cardholder's initial relinquishment of control provides the occasion for the subsequent misuse. Transfers of control that are not purely voluntary raise similar questions as to whether lesser degrees of cardholder participation in a transfer justify the imposition of full liability upon him. For example, when an unauthorized user comes into control of the card after it has been lost or misplaced by the cardholder, it might be argued that the cardholder has contributed to the subsequent financial loss to the extent that he failed to exercise reasonable care in protecting the card. A similar "con-

186. See South, *supra* note 185, at 236-37.

tribution" to loss may arise from the cardholder's failure to act in a reasonable manner in notifying the issuer of loss or theft. The question raised by these possibilities is whether there is some degree of cardholder negligence that removes the protection of the statutory limited-liability provisions in the event of loss or theft. The statute provides no definitive guide to the resolution of this question.¹⁸⁷ But, while the limited-liability provisions received little attention in the hearings and floor debate, the broad objectives and manner of implementation of the limitation afford a basis for defining the consequences of cardholder negligence.

In other statutory schemes, an individual's failure to give prompt notice following loss has particular significance. Under the Uniform Commercial Code, for example, a customer who receives a bank statement of his checking account that includes forged items "must exercise reasonable care and promptness to examine the statement and items to discover [forgeries and alterations] and must notify the bank promptly after discovery thereof."¹⁸⁸ While it has been argued that a cardholder should be bound to a similar duty of notification,¹⁸⁹ the limited-liability scheme does not appear to adopt this approach, although it does address the consequences of delayed notification of loss. As noted above, the statutory provisions encourage the cardholder to notify the issuer immediately following loss or theft: while his maximum liability is otherwise fifty dollars, prompt notification may limit actual liability to a lesser sum—the amount of unauthorized purchases made before notice.¹⁹⁰ At the same time, the statute

187. A close reading of the statute indicates not only an absence of language dealing with the significance of a card loss resulting from the negligence of the cardholder, but also some mild inconsistency in the loss events that are identified as subject to the statute. For example, it is provided that the issuer must supply a prestamped, self-addressed loss notification form to be used "in the event of *loss or theft* of the credit card." 15 U.S.C. § 1643(a) (1970) (emphasis added). On the other hand, the cardholder has liability only for unauthorized use occurring before he has notified the issuer that such a use may occur "as a result of *loss, theft, or otherwise*." *Id.* (emphasis added). Finally, the criminal sanction for misuse of a credit card applies to any "counterfeit, fictitious, altered, forged, *lost, stolen, or fraudulently obtained* credit card." 15 U.S.C. § 1644 (1970) (emphasis added).

188. UNIFORM COMMERCIAL CODE § 4-406(1). This can be compared with section 8-405(1), which provides that where a security has been lost, apparently destroyed, or wrongfully taken, the owner fails to notify the issuer of that fact within a reasonable time after he has notice of it, and the issuer registers a transfer of the security before receiving notification, the owner is precluded from asserting any claim against the issuer for registering a transfer of the security or any claim to a new security.

189. See Bergsten, *supra* note 2, at 507.

190. 15 U.S.C. § 1643(a) (1970), set out in note 34 *supra*. Congress apparently understood that this scheme of incentives would appropriately stimulate the desired response. See text at note 145 *supra*.

imposes liability upon all who fail to meet the time restriction without regard to the quality of their conduct; those who are unaware of the opportunity to limit liability further are treated the same as those who consciously choose not to provide notice. Not only is the statute silent on the impact of the motive or excuse for inaction, but the Senate Committee on Banking and Currency rejected a proposed modification that would have further penalized a particular variety of cardholder neglect.¹⁹¹ The injection of negligence principles is therefore an interference with the congressional design. Because the statute directly confronts the problem of delayed notice and provides a complete system for allocating loss, this should be regarded as the exclusive mechanism for loss distribution.

Many of the considerations militating against increased cardholder liability for a negligent failure to give notice of loss also suggest that the cardholder's negligence in the initial loss of the card does not affect the availability of statutory protection. The statutory language, for example, places no qualification on the type of card loss that will be protected, but instead is absolute in its application. Moreover, with respect to both types of negligence, the apparent congressional choice was in favor of a system of specifically defined liability limits. Such a system has the advantage of certainty for both the issuer and cardholder and, to the extent it is readily administrable, ensures effectuation of congressional policy. If exceptions were made for various degrees of negligent conduct, several undesirable results would follow. An approach based on negligence would not, for example, allay cardholder concern for potential liability from credit card use because cardholders would continue to have only imprecise guides for determining their potential liability.¹⁹² Moreover, the resultant disputes over the proper classification of the cardholder's conduct invite overstatement and coercion by an issuer attempting to maximize recovery. Consumer uncertainty is mini-

191. The Committee minority had suggested that protection from liability not be extended to a person who had "purposely refrained from informing the issuer of misuse about which he had actual knowledge." S. REP. NO. 739, 91st Cong., 2d Sess. 11 (1970). This proposal was not accepted, and the Committee-endorsed measure made no inroads on the breadth of statutory coverage.

192. Senator Proxmire, the sponsor of the bill, expressed particular concern for the "psychological burden" that the threat of liability places on an individual. 116 CONG. REC. 11829 (1970). While this remark was made in specific reference to unwanted unsolicited cards, a similar concern seems implicit in the attempt to limit potential liability of all cards. For example, the floor amendment that shifted the burden of proving liability to the issuer was regarded as a necessary complement to the limited-liability provision's objective of relieving the cardholder of inconvenience, expense, and injury to his credit standing. *Id.* at 11831 (remarks of Senator McIntyre).

mized if the liability system provides a clear standard for loss allocation. Finally, because of the legal nature of determining acceptable cardholder conduct, a fault system would attract the intervention of attorneys, and consequently increase the expenses incurred by cardholders.

The statute, if applied according to its literal terms, avoids these results and allows cardholders to make a clear appraisal of the risks of credit card use. The advantages of the limited-liability scheme are found in the certainty of its apportionment of liability. The introduction of fault concepts would substantially impede the progress that otherwise could be made toward reducing the potential for inconvenience and expense to which cardholders were formerly exposed.

C. *Implementation of the Statutory Scheme*

In order to effectuate the limited-liability provisions, the credit card statute is designed to inform cardholders about the manner by which liability is determined under the new rules. The dissemination of such information to cardholders is desirable for a number of reasons. A basic concern, of course, is that cardholders not reimburse issuers for amounts in excess of the statutory limits. This objective could not be achieved by reliance solely on issuer self-enforcement of the liability limitation. If a cardholder voluntarily paid for unauthorized charges on the assumption that he was liable for them, the issuer may not have any means by which to identify the unnecessary payment since, without cardholder notification, the issuer would often be unable to recognize unauthorized transactions.¹⁹³ Sole reliance on the issuer's observance of the statutory limitation also creates the risk that the issuer will not interpret and apply the statute with proper concern for the protection that Congress intended to afford cardholders. While provision is made for administrative con-

193. The risk of a voluntary, but unnecessary, payment by a cardholder seems particularly great when the unauthorized use is made by a relative or employee of the cardholder. The cardholder may assume that his relationship to, and perhaps control over, the unauthorized user in these cases make him responsible for charges incurred. Whether that is the case under the statute, however, depends ultimately on the establishment of an agency relationship concerning use of the card itself. Even with some information about the statute, the cardholder may still not be equipped to make a knowledgeable assessment of his liability in these cases, particularly when the issuer does not attempt to define "unauthorized use," as he is not required to do under Federal Reserve System guidelines. See 36 Fed. Reg. 1041 (1971). An awareness of the basic operation of the liability limitation should, however, increase the likelihood that the cardholder will dispute his liability for charges made by others and avoid an unquestioning reimbursement of the issuer.

trols that could prevent overreaching by issuers,¹⁹⁴ most controversies arising under the statute will be settled informally between cardholder and issuer. The cardholder who is equipped with some information about the statute will be in a better position to protect his interest without resorting to more expensive, and perhaps even unnecessary, procedures. Even when the issuer has taken the steps necessary to impose limited liability after loss of a card, the cardholder may be able to reduce his potential liability still further simply by notifying the issuer; he need not notify individual merchants nor attempt to retrieve the card. Moreover, the cardholder informed about the Act need not incur the inconvenience of giving notice of loss when such notice is unnecessary to prevent liability—for example, when the issuer has not complied with the prerequisites to imposition of limited cardholder liability. It is likely, of course, that the cardholder will eventually notify a noncomplying issuer of the loss of a card, if for no other reason than to have his account corrected and a new card issued. But if he appreciates the protection offered by the statute, the cardholder may be able to do so in a manner minimizing his personal inconvenience.

Unfortunately, although issuers are assigned a primary role in disseminating information about the operation of the liability limitation, issuer participation in the information system is not mandatory. In the congressional design, the opportunity to impose liability up to fifty dollars is intended to provide the necessary incentive for issuer compliance with the disclosure provisions of the Act. The issuer might comply with the statute for two possible reasons: (1) to limit its own financial loss by assessing its cardholders for their maximum liability under the statute, or (2) to use the threat of potential liability to prompt the cardholder to exercise care in the control of his card and to notify the issuer in the event of loss. Further analysis suggests that the first consideration is not likely to be important to most issuers and that the impact of the second is uncertain at best. The consequence is that the statutory objective will not be readily achieved, and cardholders will continue to endure some of the detrimental consequences that flow from an imperfect perception of their liability for unauthorized card use.

An issuer's eagerness to assess cardholders a portion of its fraud losses will be influenced by indirect as well as direct economic considerations. Experience prior to the statute is instructive in this re-

194. 15 U.S.C. § 1607 (1970).

gard. Issuers commonly framed cardholder agreements to impose cardholder liability for all unauthorized charges incurred prior to the receipt of notice by the issuer of the loss or theft of a card.¹⁹⁵ Yet, apparently few issuers took advantage of the right of recovery that they had preserved in the cardholder agreement. One indication of issuer hesitancy to hold cardholders liable for fraud losses is the infrequency with which issuer collection actions ultimately resulted in judicial decisions. Although credit cards and related devices have existed since the early part of the century, the number of cases considering the issue of cardholder liability is small. By 1967 there were only twenty reported decisions¹⁹⁶ and few have appeared since then.¹⁹⁷ The absence of reported decisions, of course, does not necessarily establish that issuers did not attempt collections by measures short of litigation, a possibility that requires further analysis.

While there is evidence that some issuers did attempt to secure reimbursement from cardholders, the extent of these practices was probably limited, despite contrary suggestions.¹⁹⁸ The hearings on the

195. See text accompanying note 136 *supra*.

196. See Bergsten, *supra* note 2, at 488-97, for a review of the cases.

197. See Annot., 15 A.L.R.3d 1086 (1967) & Supp. (1971) at 17-18.

198. One commentator concluded: "Apparently about half of the issuers try to recover and are successful in 30 to 50 per cent of their attempts." Note, *supra* note 100, at 1426 n.49. The author cites an interview with a New Haven issuer and an empirical study at the University of Miami: Murray, *supra* note 185, at 830. The author of a subsequent article states: "Estimates of collections on unpaid credit card debts without suit vary from 30% to 50%." Kennedy, *supra* note 33, at 32. This author's sources are the same as those of the earlier Note.

The results of the University of Miami study, conducted by Professor Daniel E. Murray, are at best inconclusive on this question. The survey included responses from several types of issuers. The responses of nine oil companies were summarized as follows:

In response to the author's inquiry as to what percentage of holders have paid voluntarily and what percentage did so after suit was filed . . . only two companies attempted an answer. One company reported that approximately 30 per cent of its holders made payment for unauthorized charges without suit being filed, while the other company said that 2 per cent of its holders paid without suit being filed and less than 1 per cent did so after suit was filed.

Murray, *supra* note 185, at 830. The report on the four airlines that responded to the survey was: "One airline reported that approximately 50 percent of its card holders voluntarily paid for unauthorized charges without any suit being filed." *Id.* at 833. Five independent issuers (American Express Co., General Electric Credit Corp., Carte Blanche Corp., Diners' Club and Playboy Clubs Intl.) were surveyed. The author reported: "Two of these companies stated that approximately one half of their holders paid for unauthorized charges made against their cards before trial and the remaining one half after trial." *Id.* at 834. In each group of respondents, some firms did not give an answer to the specific question.

It was not determined whether the percentage of the firms that attempted collections was representative of industry practice. Other sources report that most issuers did not pursue this practice. See, e.g., Wall St. J., Nov. 18, 1970, at 1, col. 6. Moreover, the survey did not determine whether firms that pursued collection efforts attempted

credit card legislation did not include a detailed inquiry into these industry practices, and other sources yield no conclusive data on the matter. There are, however, a number of instances in which industry representatives and others have recognized that issuers typically did not attempt to charge cardholders for unauthorized uses.¹⁹⁹ Credit card firms explain this willingness to absorb fraud losses in terms of protecting customer good will. The adverse publicity resulting from a rigorous enforcement policy is likely to have a significant effect on the issuer's competitive position, especially if other issuers adhere to a policy of not assessing fraud losses against their cardholders. Such publicity would also heighten the general awareness of the dangers of credit card use, thereby adversely affecting the public's receptiveness to credit cards.²⁰⁰ Equally significantly, collection techniques involving litigation or significant manpower expenditures probably cannot be justified by issuers in most cases because the amount of loss is small.²⁰¹ The collective impact of these considerations led most issuers to absorb their fraud losses, despite the continued use of agreement terms purporting to relieve the cardholder of liability only after notice.

In light of the industry practice that prevailed, it would seem that few issuers will take the required statutory steps solely in order to shift a portion of their fraud losses to cardholders. An issuer's compliance with the statutory requirements would result in additional costs,²⁰² while the issuer's potential recovery is now limited to a maximum of fifty dollars. Those issuers who previously chose

them in all cases. Considerations such as the size of the cardholder's account balance and his propensity toward a retaliatory suit suggest that such action would sometimes be imprudent.

199. Many issuers took this position in the congressional hearings. *See, e.g., 1970 House Hearings, supra* note 14, at 91 (testimony of Earl Pollock, Midwest Bank Card System, Inc.); *id.* at 215 (statement of Clifford Venarde, Shell Oil Co.). *See also 1968 Senate Hearings, supra* note 37, at 2, 4-5 (statement of Andrew F. Brimmer, Board of Governors, Federal Reserve System); South, *supra* note 185, at 226.

200. The credit manager of an oil company reported: "Every time the papers report customer losses on stolen credit cards we get hundreds of credit cards returned to us." *1969 Senate Hearings, supra* note 39, at 217, 218 *reprinting* NATL. PETROLEUM NEWS, April 1967.

201. In a survey of several large oil companies, it was found that the amount of unauthorized charges against lost cards averaged \$151. One issuer (a bank) indicated that it experienced only a \$38 average loss. *See Murray, supra* note 185, at 829, 836.

202. The issuer must draft, publish, and distribute both the required notices and the self-addressed, prestamped loss notification form. In addition, new security systems must be devised to handle card returns, inquiries, and requests for replacement cards. Moreover, many issuers would have to develop a new format for their cards in order to meet the statutory requirement of inclusion of a reasonable identification device.

not to press for cardholder liability are not likely to incur additional costs solely to preserve a right to a recovery that they did not intend to exercise. Similarly, those few issuers who sought reimbursement from cardholders will now be discouraged from such action by the limitation placed on the potential recovery. Without the likelihood of a recovery sufficient to cover collection costs, formal enforcement actions are unlikely, and measures short of litigation should also be curtailed.

Even absent an expectation of shifting some portion of fraud losses to cardholders, an issuer will be concerned that cardholders both protect their cards from loss and give notice in the event of their loss. This kind of care could be encouraged if the issuer satisfied the limited-liability requirements to continue the threat of potential liability in the event of unauthorized use. But it is possible that the desired cardholder care might be forthcoming even if an issuer does not meet the statutory prerequisites for limited cardholder liability. Issuers have made a concerted effort to foster the notion among cardholders that liability may attend the loss of a credit card,²⁰³ and this notion is likely to linger despite the enactment of S. 721. Even apart from this consideration, issuers would have the benefit of a natural tendency among cardholders to approach their financial dealings with a concern for potential injury.²⁰⁴ Absent clear information to the contrary, a cardholder's probable reaction to the loss of his card will be one of concern. While the cardholder may be uncertain about his legal liability for unauthorized charges, the situation is likely to be viewed as calling for protective measures; the most logical step to minimize the prospects of liability is to inform the issuer of the loss of the card.

In evaluating whether to incur the cost of providing cardholders with information about the statute, the issuer must assess the extent to which it may otherwise be the beneficiary of a cardholder's natural or industry-generated concern for potential liability. The issuer may not always decide that its interests are protected without compliance with the statute, for the relevant factors are not suscep-

203. See text accompanying notes 136-37 *supra*.

204. It has been recognized by enforcement personnel that issuers might attempt to rely on a tendency among cardholders to overestimate their potential liability and, hence, to avoid disclosure of the operation of the statute. Staff members "at the FTC's Division of Consumer Credit and Special Programs say that most companies have a lot to gain by keeping their customers uninformed. If a cardholder knows that his liability is limited to \$50, for example, he may not be so prompt in letting the company know when he finds that his card is missing." *TIME*, Sept. 13, 1971, at 80.

tible to precise definition. In addition, if the desired response is not forthcoming from its cardholders, the risk that the issuer faces is substantial. The point is that the issuers' responses will reflect the incentives that the statute provides. Because the incentives that Congress created are not strong, the degree of issuer compliance will be uneven. Unless the disclosure system is restructured, many issuers will choose not to take advantage of the opportunity to impose limited liability on cardholders. They will be content to create the impression of potential liability and thereby stimulate cardholders to protect their cards, but stop short of doing all that would technically be necessary to impose liability. Hence, issuer disclosure of information about the statute may be limited to a cursory statement of potential liability.²⁰⁵ Even those issuers who choose to meet the statutory requirements are not likely to regard their compliance as requiring any immediate action; the timing of the statutory disclosures might be geared to other changes in the issuer's program, such as the redesign or reissuance of cards.

The response of credit card companies since the enactment of the credit card provisions confirms that the statute provides at best a limited incentive for issuer participation in the information dis-

205. The response of one major oil company illustrates this type of situation. The issuer distributed information intended to correct statements on its outstanding cards to the effect that the cardholder had liability for all unauthorized charges made prior to notification of loss. The issuer's disclosure took this form:

IMPORTANT NOTICE
CHANGE IN CREDIT CARD AGREEMENT

You *may* have a credit card which, contrary to the provisions of the Truth in Lending Act, overstates your liability for the unauthorized use of your card.

All provisions appearing on your credit card which impose liability in excess of that imposed by the terms of the Truth in Lending Act are hereby deleted. Your liability for unauthorized use under the Truth in Lending Act can, in no event, exceed \$50.00.

American Oil Co., Notice, November 1971, on file with the *Michigan Law Review*. This disclosure is not sufficient to permit the issuer to impose any liability on cardholders. It fails to make clear the "pertinent facts" about the operation of the statute, as is required by the Truth-in-Lending Act. 15 U.S.C. § 1602(j) (1970), set out in note 34 *supra*. The cardholder is not told the circumstances in which his liability may be less than fifty dollars. See 15 U.S.C. § 1643(a) (1970), set out in note 34 *supra*. Moreover, while the issuer distributed a notification-of-loss form, it was not prestamped as required by the Act. 15 U.S.C. § 1643(a) (1970). Although the statement of maximum liability is a correct generalization about the Act, it does not accurately assess the cardholder's liability; he bears no liability in any amount for the unauthorized use of this issuer's cards. But it may be unimportant to the issuer that it will not be able to recover from its cardholders. Its disclosure will cause most cardholders to believe that some liability may be imposed; hence, they will be likely to exercise care with their card and to give notice to the issuer in the event of loss in order to minimize that perceived liability.

semination scheme. In the first year following enactment of the statute, only a very few firms gave any public recognition to the new rules for determining cardholder liability. This delayed initial reaction occurred even though the consequence to noncomplying issuers was the elimination of any right to demand notice from cardholders or reimbursement for unauthorized charges. Since the initial period, the number of issuers distributing information about the statute has increased.²⁰⁶ Nevertheless, it remains clear that many issuers still prefer to operate without preserving their right to impose liability within the statutory limits. Their response is evidently not evoked by the statute's supposed incentive.

206. An informal survey, by the author, of thirty issuers indicates that in the first year after enactment, only two took steps to comply with the conditions for imposing limited liability on cardholders. An additional ten issuers have since distributed information about the statute, but in only four of these additional cases was the disclosure sufficient to impose liability on the cardholder. In the other situations, the disclosure was intended to point out the invalidity of statements on the issuers' cards that purported to impose greater liability on the cardholder than is permitted under the statute.

The survey included four cards issued by retail department stores. Interestingly, none of these issuers had responded to the statute, although other classes of issuers were not as uniform. While the survey is sufficiently unscientific to render any generalizations suspect, it may be that many relatively small retailer-issuers were not responding to the statute because of the greater cost per unit of compliance and their greater control over the security of their cards resulting from the limited number of outlets at which they were accepted.

A similarly unsystematic, but perhaps somewhat more comprehensive, survey was conducted among issuers of bank cards. These results confirm an absence of enthusiasm among banks to take steps to impose liability on cardholders. Between forty and fifty banks in the twelve Federal Reserve Districts were asked if they were aware of instances in which a bank attempted to assess the fifty-dollar liability limit against a credit card user. In all but two districts, there were no reported instances of collection attempts. In those districts where enforcement activity was reported, action was taken by only a few banks. Brimmer Paper, *supra* note 45, at 20-26.

The report of this survey does not clearly specify whether the banks had chosen not to satisfy the statutory requisites for imposing limited liability, or whether they had made the necessary disclosures but then decided not to seek the recovery allowed by the statute. Several responses suggest that the banks had not complied with the requirements. In the Dallas district, for example, it was reported that "[i]n general, little has been done to formulate a policy for operating under the \$50 rule of the October 26 legislation. Typically, the legislation has not resulted in any change in banks' operations with respect to unauthorized use of credit cards." *Id.* at 25. Similarly, only one bank in the New York district "is sending a pre-printed notification form to customers as required by the amendment to Regulation Z." *Id.* at 22.

A number of reasons are identified for the banks' decision to absorb fraud losses. In one district "public relations and other competitive reasons" were cited. *Id.* at 22. In the Richmond district, "it appears to be the consensus among banks that attempting to assess the loss will probably not be worth the cost in the long run." *Id.* at 24.

An inquiry by the Federal Trade Commission further confirmed the failure of the statute to attract widespread issuer participation. "According to the FTC, none of the major card companies have presented evidence that it is complying with the provisions of [the statute]." TIME, Sept. 13, 1971, at 78. Plans by some large issuers to inform their cardholders of the act were noted, however. *Id.* at 80.

In other cases, even after enactment of the statute, many issuers continued to distribute materials that stated conditions of cardholder liability in the same terms used prior to the statute.²⁰⁷ These provisions overstating the cardholder's potential liability were not enforceable under the statute, but neither was their inclusion in agreements specifically prohibited. The continued dissemination of this information, however, did create the risk that cardholders might unnecessarily reimburse the issuer for losses, and thus is contrary to the spirit of a statute intended to place cardholder liability within well-defined limits. Apparently recognizing that this conflict might lead to administrative regulation, some issuers have undertaken to correct the erroneous impression fostered by credit card agreements.²⁰⁸

These attempts to correct clearly erroneous statements, even if made without an intention to meet the statutory prerequisites for cardholder liability, still have the desirable effect of increasing cardholder awareness of the statute. There are, however, obvious difficulties with a situation in which the consumer is given information that contradicts his credit card agreement. In most cases, the disclaimer of liability did not have the same prominence as the improper language, as the correcting language was often in a form neither as durable nor as noticeable as the announcement of liability printed on the card itself. Consequently, the issuer's original overstatement of liability may continue to have some effect, and thus perpetuate consumer acceptance of a liability system that the statute legally reverses. Another risk, perhaps less systematic in nature, is that the information conveyed by the disclaimer will give an incomplete description of the operation of the statute. As is suggested by the disclaimer forms actually used by some issuers, the cardholder may be prompted to take action that is not required by the statute, either in making reimbursement or giving notice.²⁰⁹

207. In most cases, the continued distribution of these statements was probably a result of attempts by issuers to exhaust existing supplies of cards and cardholder agreements, which had been prepared prior to passage of the statute.

208. *E.g.*, disclosure of American Oil Co., *supra* note 205. *See also* note 206 *supra*.

209. For example, one of the two major bank credit franchises has distributed a printed form that advises recipients to disregard a legend on its credit cards stating that the cardholder bears full liability for all unauthorized uses that occur prior to notification of loss or theft of a card. The form also sets out the statutory requirements for imposing partial liability on the cardholder. The form fails to state, however, whether the issuer has complied with the terms of the statute. Master Charge Disclosure Form, September 1971, on file with the *Michigan Law Review*. *See also* note 205 *supra*.

Cardholders receiving this information are likely to be confused about the extent

This type of confusion is understandable during the period immediately following adoption of the statute since outstanding cards and literature had been drafted on the basis of prestatutory law. But even allowing for an issuer's desire to use up existing supplies of materials, the likely encroachment upon the statutory design by the continued distribution of contradictory materials provides a basis for concern. The Federal Reserve Board eventually issued an informal ruling that designated January 25, 1972, as the cut-off date for the distribution of credit card materials that misstated cardholder liability;²¹⁰ in a subsequent clarification, it stated that the mere inclusion of a corrective statement would not be sufficient to validate the use of dated materials.²¹¹ No action has yet been taken to require the recall of outstanding cards that misstate liability; it is apparently expected that normal attrition through expiration and reissuance of current cards will eventually lead to the elimination of these materials.²¹²

A matter of more enduring concern is the absence of a provision making mandatory the disclosure of information about the liability limitations. The statute permits the issuer to leave the cardholder without any indication of his responsibility either to give notice of loss or to reimburse the issuer for the fraudulent use of his card. The operation of the statute in this regard is somewhat curious for it seems to reflect a basic inconsistency in the apparent legislative policy underlying the provision. On the one hand, Congress recognized that it is not enough to change the rules for cardholder liability without informing cardholders of the new loss-allocation system. Yet, at the same time, this recognition is given only limited expression since an issuer is required to explain the limits of its right to

of their liability. The manner in which this information is presented may lead some cardholders to believe that the fifty-dollar liability applies to them. The statement may therefore prompt cardholders to give the issuer notification of loss to which it is not entitled. In other cases, the cardholder may unquestioningly reimburse the issuer for unauthorized charges of less than fifty dollars. To the extent that issuers encourage—even unintentionally—this gratuitous response by cardholders, the statutory design is frustrated.

210. See 4 CCH CONSUMER CREDIT GUIDE ¶ 30,740 (1971) (excerpts from Fed. Res. Bd. opinion letter of Oct. 15, 1971, No. 528, by J. L. Robertson).

211. See *id.* ¶ 30,778 (1972) (excerpts from Fed. Res. Bd. letter of Dec. 1971, No. 557, by Griffith L. Garwood).

212. Some issuers, particularly small ones such as department stores, do not have systematic reissuance programs. Misstatements of liability for these issuers are likely to endure. Even in cases in which the issuer follows a yearly renewal program, cards that incorrectly state cardholder liability may have continued in circulation for two and one-half years after the effective date of the new statutory liability provisions.

impose cardholder liability only if it desires to preserve that right. The determinant of the availability of information to the cardholder is the issuer's assessment of the desirability of preserving an option to impose limited liability. Notably, this calculus does not necessarily bear any direct relation to the cardholder's *need* for information. Even in situations where the law provides that no portion of an unauthorized charge may be assessed against him, the cardholder needs this information in order to adjust his response to the fraudulent use of his card.

The goal of preventing unnecessary cardholder responses may be achieved without the participation of all issuers in the disclosure scheme. Knowledge of the statute acquired from one issuer's disclosure can be applied to situations involving other issuers. But a number of conditions must first be present. Most importantly, a great number of issuers would have to disclose the required information in a form indicating the general applicability of the liability rules. Furthermore, by virtue of the structure of the disclosure system, issuers who choose to deliver the required information have no reason to indicate that the cardholder would have had no liability if the disclosure had not been made. Thus, when cardholders receive a statement about the applicability of the statute, it will be framed only in terms of a positive identification of liability. There is no incentive for an issuer to identify the extent to which its announced liability rules are applicable to transactions involving the cards of other issuers. In light of these factors and the absence of a uniform disclosure form, a cardholder may not recognize the applicability of the statutory controls to credit cards generally.

The presence of credit card arrangements that are silent about the liability rules applicable in the event of misuse continues the risk of unnecessary cardholder action and expense. A minor modification of the statutory provision can ensure that this risk is substantially alleviated. Each issuer should be required to inform cardholders of the liability rules that apply in the event of an unauthorized transaction. Thus, issuers who choose not to preserve the option of imposing limited liability would be required to explicitly inform the cardholder that no adverse economic consequences result from the misuse of his card. It is assumed that many issuers would oppose such a disclosure because of a fear of encouraging laxity among cardholders in the care of cards, and out of concern for the loss that might occur if cardholders failed to inform them of the loss of a card. Such an attitude by issuers may be quite desirable as a policy matter:

these are the concerns that Congress assumed would operate to prompt issuers to preserve their right to impose limited liability and to disseminate information about the statute. Only if issuers are made to confront these pressures directly is the statute likely to operate in accordance with the apparent congressional design. Rather than risk cardholder carelessness in card use, issuers would take advantage of the opportunity to create an economic incentive for the desired cardholder care by fulfilling the requisites for the imposition of limited liability.²¹³

D. *The Effect of State Statutes and Cardholder Agreements on Cardholder Liability*

In a provision added during the floor debate, the new federal credit card law provides that the amount of cardholder liability will be governed by any "other applicable law or . . . agreement with the card issuer" that sets liability at less than fifty dollars.²¹⁴ This invitation to look for liability limitations in other sources is likely to have limited practical impact. But in a few situations in which other limitations are applicable, potentially complex interpretive problems may obfuscate the desired objective of readily ascertainable liability limits.

Several issuers have long observed the practice of stating a specific dollar limitation on cardholder liability in the cardholder agreement. The liability ceilings, however, have generally been higher than the maximum established by the federal enactment.²¹⁵ Industry representatives commenting on S. 721, while generally receptive to the concept of a liability limitation, questioned the effectiveness of a fifty-dollar ceiling and urged adoption of a greater amount.²¹⁶

213. Of course, if a disclosure of nonliability were compelled, some cardholders who have no liability at present would therefore be exposed to the potential fifty-dollar liability as issuers chose instead to comply with the statutory requirements for recovery. In practice, however, these issuers are not likely to enforce their rights to receive reimbursement. In any case, a judgment might properly be made that cardholders should not be left without adequate information about the statute, the result that is perpetuated under present law.

214. 15 U.S.C. § 1643(c) (1970), set out in note 34 *supra*. See 116 CONG. REC. 11830 (1970) (remarks of Senator Proxmire).

215. Examples of liability limits imposed by several companies are American Express Co.—\$100, cited in Macaulay, *supra* note 136, at 1114 & Bergsten, *supra* note 2, at 504; Diners' Club—\$100, cited in Bergsten, *id.*; Shell Oil Co.—\$100, cited in 1970 *House Hearings*, *supra* note 14, at 225, 226 (submission of W. J. Bittles, Jr., General Manager of Retail Marketing, Shell Oil Co.).

216. See 1970 *House Hearings*, *supra* note 14, at 225, 227 (submission of W. J. Bittles, Jr., General Manager of Retail Marketing, Shell Oil Co., urging a \$100 ceiling); 1969 *Senate Hearings*, *supra* note 39, at 103, 106 (statement of Thomas Bailey,

Absent a significant change in fraud loss experience, it is doubtful that issuers would now move to a lower self-imposed limit.

A few states have adopted statutory limitations on cardholder liability.²¹⁷ The majority of these will have little effect because the dollar amount specified either equals or exceeds that of the federal statute.²¹⁸ Yet, in some of the situations in which a state enactment might control allocation of liability, the lower limitation is qualified so as to add a new level of complexity to the determination of cardholder rights. Under the Illinois statute, for example, the cardholder's maximum liability *increases* with the greater reliability of the issuer's identification technique. Cardholder liability cannot exceed twenty-five dollars in situations where the issuer has failed to provide a

American Bankers Association, urging a \$100 ceiling); *id.* at 123, 125, 127 (statement of Edward J. McNeal, American Retail Federation). *But see* 118 CONG. REC. 11830 (1970) (remarks of Senator Proxmire, reporting a \$25 ceiling applied by a "large New York bank").

217. *See* CAL. CIV. CODE § 1747.20 (West Supp. 1972); ILL. ANN. STAT. ch. 121½, § 382 (Smith-Hurd Supp. 1972); ME. REV. STAT. ANN. tit. 9, § 3927 (Supp. 1972); MASS. GEN. LAWS ANN. ch. 255, § 12E(3) (Supp. 1971); MINN. STAT. ANN. § 325.932 (Supp. 1972); N.J. STAT. ANN. § 17:10A-3 (Supp. 1972); N.M. STAT. ANN. § 50-19-4 (Supp. 1971); N.Y. GEN. BUS. LAW § 512(1) (McKinney Supp. 1971); N.D. CENT. CODE ANN. § 51.14.1-02 (Supp. 1971); TENN. CODE ANN. § 47-15-117 (Supp. 1971).

A number of state statutes absolve the intended cardholder of liability for the unauthorized use of an unsolicited credit card before his acceptance or use of it. *See, e.g.,* ALASKA STAT. § 06.05.209 (Supp. 1971); DEL. CODE ANN. tit. 6, § 2542 (Supp. 1970); HAWAII REV. LAWS § 730-12 (Supp. 1971); KAN. STAT. ANN. § 50-618 (Supp. 1971); MD. ANN. CODE art. 83, § 21B (1969); OHIO REV. CODE ANN. § 1319.01 (Anderson Supp. 1971); S.D. COMP. LAWS ANN. § 54-11-4 (Supp. 1972); VA. CODE ANN. § 11-31 (Supp. 1971); WIS. STAT. ANN. § 134.71 (Supp. 1972).

The federal statute achieves the same result, for a cardholder bears no liability for an unauthorized use unless his card is an "accepted credit card," 15 U.S.C. § 1643(a) (1970), set out in note 34 *supra*. *See* text accompanying note 120 *supra*.

Under the federal statute, a holder of an unsolicited, but accepted, card could have liability up to fifty dollars in the event of its unauthorized use. 15 U.S.C. § 1643(a) (1970), set out in note 34 *supra*. The statute does not make it explicit that this limited liability applies only to unsolicited cards issued prior to the effective date of the prohibition of unsolicited mailings. 15 U.S.C. § 1642 (1970), set out in note 34 *supra*. It can be argued that the definition of "accepted credit card" was intended only to validate unsolicited cards outstanding at the time of enactment. Cards subsequently issued in violation of the statute might be viewed as creating illegal contracts that are not enforceable for any purpose. Without such a rule, an issuer might be tempted to make an unsolicited distribution in the expectation that the cards would quickly be "accepted," thus gaining an advantage the statute seeks to deny. A Rhode Island statute that prohibits the mailing of unsolicited cards confronts this problem directly by precluding the issuer "from maintaining any civil action for the recovery of any debt created through the use of" an unsolicited card. R.I. GEN. LAWS ANN. § 6-30-4 (Supp. 1971).

218. *See* ME. REV. STAT. ANN. tit. 9, § 3927 (Supp. 1972) (§50); MASS. GEN. LAWS ANN. ch. 255, § 12E(3) (Supp. 1971) (§50); MINN. STAT. ANN. § 325.932 (Supp. 1972) (§50); N.J. STAT. ANN. § 17:10A-3 (Supp. 1972) (§50); N.M. STAT. ANN. § 50-19-4 (Supp. 1971) (§50); N.Y. GEN. BUS. LAW § 512(1) (McKinney Supp. 1971) (incorporates federal limit); N.D. CENT. CODE ANN. § 51.14.1-02 (Supp. 1971) (§100).

signature panel on the card.²¹⁹ However, since under the federal statute a means of identifying the holder must be included on the credit card as a prerequisite to imposing limited liability,²²⁰ the Illinois statute will prevail only until the federal statute is fully implemented.²²¹

The liability limitations in the California and Tennessee statutes have a more enduring effect. Both are significant because they relieve the cardholder from all liability for unauthorized use if he promptly notifies the issuer of his loss.²²² Although the apparent intent of the federal scheme was to abandon fault concepts in favor of a system of specifically defined liability,²²³ its deference to statutes such as those in California and Tennessee reintroduces the question of the quality of the cardholder's action. The California statute requires nonnegligent conduct at two important stages: not only must notification be within a reasonable period of time after discovery of the loss, but the delay in the discovery must also not exceed that which "a reasonable man in the exercise of ordinary care" would have experienced.²²⁴ In addition to requiring prompt notification, the Tennessee provision absolves the cardholder of liability only if he "exercises reasonable care in [the] use and safekeeping" of his

219. ILL. ANN. STAT. ch. 121½, § 382(a) (Smith-Hurd Supp. 1972). Originally, a liability ceiling of seventy-five dollars was provided if the card had a signature panel. [1967] Ill. Laws 365, § 2 (July 27, 1967). The graduated system of issuer liability was intended to encourage issuers to resort to more reliable identification techniques. The fifty-dollar ceiling of the federal statute took precedence, and the Illinois statute was amended by P.A. 77-1637, [1971] Ill. Laws 2580, § 1 (Sept. 24, 1971) to limit maximum liability to fifty dollars.

New York had a provision with a graduated ceiling similar to the Illinois statute. See ch. 998, § 5 N.Y. Laws 3103, 3104-05 (May 19, 1970). In 1971, this was replaced by a measure incorporating the limitations of the federal statute. N.Y. GEN. BUS. LAW § 512 (1) (McKinney Supp. 1971).

220. 15 U.S.C. § 1643(a) (1970), set out in note 34 *supra*.

221. The Illinois statute will only affect losses arising prior to Jan. 24, 1972, and then only if the cards involved were issued prior to the effective date of the federal statute. This result follows because all issuers desiring to impose any liability at all must provide some means of identification on the card. Cards newly issued after the effective date of the limited-liability provision, Jan. 24, 1971, must meet this standard, while cards that were outstanding on that date must meet the identification standard one year later. 36 Fed. Reg. 1041 (1971). The twenty-five-dollar limitation of the Illinois statute for cards with no means of identification will then be obsolete.

222. See CAL. CIV. CODE § 1747.20 (West Supp. 1972); TENN. CODE ANN. § 47-15-117 (Supp. 1971). If the cardholder fails to give the necessary notice, his liability cannot exceed fifty dollars under the California statute. The Tennessee enactment establishes a one hundred dollar liability ceiling if no notice is given. This limitation is no longer effective, and the cardholder's liability will be defined by the fifty dollar limitation of the federal statute.

223. See text accompanying notes 187-92 *supra*.

224. CAL. CIV. CODE § 1747.20 (West Supp. 1972).

card.²²⁵ The utilization of these flexible standards lessens the certainty of statutory application and increases both the cardholder's difficulty in assessing his liability and the issuer's opportunity for overreaching. The relatively small amount of liability involved, however, diminishes the significance of these consequences and, thus, the resultant disruption of the federal scheme.

An unresolved question is whether the deference to state liability-limiting rules extends to those arising from judicial interpretation. Several cases decided prior to the enactment of the federal statute developed the doctrine that a merchant had an obligation to exercise care in accepting a credit card.²²⁶ Thus, the cardholder was relieved of liability for unauthorized purchases if the merchant failed to question the identity or authority of the user when circumstances suggested the appropriateness of such an inquiry.²²⁷ Injection of this rule into the federal statutory scheme would further relieve cardholders of responsibility for unauthorized uses of their cards. What is uncertain, however, is whether "other applicable law," as embodied in the federal enactment, encompasses judicially pronounced rules.

Debate about the breadth of statutory incorporation of other "law" has considerable historic significance, for this issue was at the center of the controversy concerning the law to be applied by federal judges in actions based solely on diversity of citizenship. The prevailing resolution, announced in *Erie Railroad Co. v. Tompkins*,²²⁸ is that a statutory reference to "the laws of the several states" encompasses both legislative and judicial pronouncements; yet, many courts indicate a continuing willingness to conclude that in construing a particular statute purporting to incorporate state laws, only legislative acts were intended to be incorporated. Legislative history,

225. TENN. CODE ANN. § 47-15-117 (Supp. 1971).

226. See *Duke v. Sears, Roebuck & Co.*, 433 S.W.2d 919 (Tex. Civ. App. 1968); *Union Oil Co. v. Lull*, 220 Ore. 412, 349 P.2d 243 (1960); *Allied Stores of N.Y., Inc. v. Funderburke*, 52 Misc. 2d 872, 277 N.Y.S.2d 8 (New York City Ct. 1967). See also *Gulf Ref. Co. v. Williams Roofing Co.*, 208 Ark. 362, 186 S.W.2d 790 (1945). See generally Note, 43 N.C. L. REV. 416 (1965); Recent Case, 109 U. PA. L. REV. 266 (1960).

227. Inquiry was found to be necessary when an unusually large number of purchases were made on the account in a short period of time. See *Allied Stores of N.Y., Inc. v. Funderburke*, 52 Misc. 2d 872, 277 N.Y.S.2d 8 (New York City Ct. 1967); *Duke v. Sears, Roebuck & Co.*, 433 S.W.2d 919 (Tex. Civ. App. 1968). Inquiry was also required when there was a discrepancy between the state of the cardholder's residence as printed on the card and the state of registration of the car for which petroleum products were purchased. *Union Oil Co. v. Lull*, 220 Ore. 412, 349 P.2d 243 (1960).

228. 304 U.S. 64 (1938). In question was the section of the Judiciary Act of 1789 providing "that the laws of the several states . . . shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." 28 U.S.C. § 725 (1970).

policy, and the contextual implications of a usage are frequently employed to support the finding of such a limitation.²²⁹

Application of these guides to the federal credit card statute suggests that only legislative enactments should be applied as further limitations of cardholder liability. In introducing the amendment that gave controlling effect to "other applicable law," Senator Proxmire observed that the bill was designed to accommodate state action "intended to go beyond the Federal legislation and reduce the consumer's liability to less than \$50."²³⁰ While he did not indicate specifically that he contemplated only legislative action, his remarks were in the context of a discussion of existing state enactments, suggesting that he understood the primary impact of the amendment to be its incorporation of state statutory limitations. Also, the amendment sought to ensure that the new statute, intended to advance consumer protection, did not actually increase the cardholder liability otherwise governed by more favorable loss-distribution mechanisms.²³¹ The hearings suggest that the prevailing understanding was that such mechanisms took the form of either statutory or contractual limitations.²³² Consequently, it appears that the proponents of the amendment had only these two types of restrictions in mind when they moved for its enactment.

The congressional design for the new loss-distribution scheme also supports the view that a merchant's negligence should not provide a further limitation on cardholder liability. Prior to the statute, the decision to shift liability from the cardholder to the issuer as a consequence of a merchant's negligence could be justified in order to stimulate issuers to ensure that merchants exercised care in accepting credit cards. Since control of this type of loss more clearly rested on the issuer than the cardholder, it seemed appropriate that

229. See *In re Chicago Express, Inc.*, 332 F.2d 276, 279 (2d Cir. 1964). See also *Ammond v. Pennsylvania R.R.*, 125 F.2d 747 (6th Cir.), *cert. denied*, 316 U.S. 691 (1942); *Wickes Boiler Co. v. Godfrey-Keeler Co.*, 121 F.2d 415 (2d Cir.), *cert. denied*, 314 U.S. 686 (1941); *Neff v. Hindman*, 77 F. Supp. 4 (W.D. Pa. 1948).

230. 116 CONG. REC. 11830 (1970).

231. *Id.*

232. See, e.g., 1969 Senate Hearings, *supra* note 39, at 66 (statement of Robert Meade, Director, President's Committee on Consumer Interests); *id.* at 106-07 (statement of Thomas Bailey, American Bankers Association); *id.* at 127 (discussion between Edward J. McNeal, American Retail Federation, and Senator Proxmire). Discussions of existing liability limitations typically included references only to state statutes and cardholder agreements. E.g., *id.* at 66 (Massachusetts statute); *id.* at 106 (New York statute); *id.* at 127 (Illinois statute). Judicially developed restrictions were not generally considered. This was probably due in part to the limited number of decisions supporting such limitations and the uncertainty of their impact.

the issuer bear the costs of these transactions.²³³ The enactment of the federal credit card statute removes much of the force of this justification since the issuer now bears the major responsibility for fraud losses in any case. The prospect of liability for all unauthorized charges in excess of fifty dollars should provide an adequate stimulant for the issuer to take the steps that the prestatutory negligence rules sought to promote.

Some doubt must remain as to the meaning of the incorporation provision because the particular language used is broad enough to encompass a limiting law in any form. It seems preferable, however, to accept the implications of the circumstances surrounding adoption of the amendment. If only legislative acts were incorporated, another potentially troublesome fault concept would be avoided with an accompanying reduction in both the likelihood of protracted controversy and the need for professional interpretation. While this approach may deny the cardholder an important weapon for avoiding the fifty-dollar liability in particular cases, such a result can be accepted as a necessary consequence of the effort to establish a new system of specific liability limitations.²³⁴

IV. CONCLUSION

When Congress set out to reform the credit card industry, its primary concern was with the implications of unsolicited distribution of such devices. The initial legislative proposals were concerned only with this practice, and the hearings gave only limited attention to other issues. This is unfortunate because the other provisions of the enactment—particularly those limiting cardholder liability—will require much attention in their interpretation and application. A more complete statement of the legislative understanding would

233. The fact that few issuers attempted to pass fraud losses on to individual cardholders limits the practical importance of this argument. The suggested justification, however, does serve to explain those few cases in which merchant negligence was utilized as a loss-allocation principle.

234. Another aspect of the legislative history of S. 721 is relevant to the role of issuer or merchant negligence in accepting a card in an unauthorized use. A proposed modification in Committee would have required the issuer to inform the cardholder that "the card issuer or his agent has a responsibility to assure that purchases made on the card were made by the person identified on the card or a person authorized by him." S. REP. NO. 739, 91st Cong., 2d Sess. 11 (1970). The reason for its rejection is not clear, since the Committee deliberations are not reported. However, the fact that Congress apparently considered the idea that merchant negligence might further limit cardholder liability—and did not modify the statute to incorporate it—may support the inference that the statutory scheme was intended to operate without regard to the care that merchants exercised in accepting cards from unauthorized users.

have avoided some of the interpretive difficulties that the statute presents.

.. In the absence of specific legislative direction, application of the statute will require resort to general policies. The statutory design itself yields one such principle. The liability limitation implicitly recognizes the need not only to restructure legal rules to protect consumers adequately, but also to ensure that consumers are given information that will enable them to utilize the protections provided. Achievement of the goal of increasing consumer awareness requires also that particular attention be given to the substance of the new rules. An effort must be made to structure a loss-allocation system that can be conveyed in understandable form. Hence, the emphasis should be upon rules that carry readily discernible implications. Does the federal credit card legislation have this quality? A basic premise of this Article is that there are a number of features of the statute—the reliance on agency concepts, the reference to the cardholder benefit in the definition of unauthorized use, the undefined role of cardholder negligence—that have a potential for interpretive complexity.

Cases raising these interpretive problems should be resolved in a manner promoting consumer certainty by drawing clear distinctions between circumstances that give rise to full liability and those to which the limited-liability provisions of the statute are applicable. In so doing, traditional legal principles of construction may occasionally be slighted, but this result must be accepted as a necessary effect of the commitment to make the law more sensitive to the concern of a consuming public.